S. HRG. 100-369, PT. 1

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1987

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 1703

TO AMEND THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

SEPTEMBER 21, 1987
TAMPA, FL

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INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1987

MONDAY, SEPTEMBER 21, 1987

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:15 a.m., in rooms 5 and 6, Hyatt Regency Hotel, 211 North Tampa Street, Tampa, FL, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye and Evans.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Pursuant to the rules of the U.S. Senate, and authority vested in me by those rules, I am pleased to call this hearing to order to consider S. 1703, the Indian Self-Determination and Education Assistance Act Amendments of 1987.

The committee has worked closely with Indian tribal leaders for the past 8 months to develop these amendments. In March of this year, Indian leaders from the states of Washington, Oregon, Arizona, Alaska, South Dakota, and Mississippi met with committee staff for 2 days to educate staff about tribal concerns with self-determination contracts.

Tribal elected officials, program planners, financial managers, and program directors explained to the staff problems with unstable contract funding, the failure of Federal agencies to fully fund tribal indirect cost rates, the inappropriate application of Federal acquisition regulations to self-determination contracts, and other matters.

The committee also held a meeting on April 22 and heard many excellent recommendations from tribal witnesses. The committee responded positively to these recommendations. On August 17 we sent a draft bill to tribal elected officials for review and comment.

This bill addresses many tribal concerns, and they include: the need for the Bureau of Indian Affairs and the Indian Health Service to fully fund tribal indirect costs for self-determination contracts; the need for year-to-year stability of contract funding levels in order to improve planning and management of programs; clarifying that Federal acquisition regulations do not apply to self-determination contracts; allowing tribes that have successfully operated programs for 3 or more years, and that have clean audits, to enter into 5-year mature contracts; reducing the paperwork and reporting requirements for mature contracts; alleviating problems associated with over-recovery and under-recovery of indirect costs from Federal agencies other than the BIA and IHS; and improving avenues for contract appeals and conflict resolution.

While we believe that this is a good bill, we do not pretend to be the experts on these complicated matters; therefore, we need a very careful review of our efforts to address indirect costs. We still need to address the area of construction contracts.

The tribal elected officials and program directors who have worked with self-determination contracts for many years are the real experts; therefore, if you have any recommendations for changes or improvements that are needed, this is the time for you to let us know. The committee is relying on you for guidance in this very important area.

I am pleased to present to you the vice chairman of the Senate Select Committee on Indian Affairs, Senator Daniel Evans of the State of Washington.

Senator Evans. Thank you, Mr. Chairman.

I am delighted to be here and to join with the chairman in these hearings. He has stated the elements in the bill succinctly and well. It is important now for us to hear from all of you as to how close we are to the mark, additions and changes that might be necessary to make this an even better bill. It is certainly my hope—and I know that of the chairman and the members of the committee—to attempt to move strongly in this field during this congress to try to open up new opportunities to finally fulfill, as closely as we can, the real concepts of self-determination that have been the goal of so many for so many years. I look forward with real interest to your testimony and to the help that we will have from that.

[The text of S. 1703 follows:]

100TH CONGRESS
1ST SESSION

S. 1703

To amend the Indian Self-Determination and Education Assistance Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 18 (legislative day, SEPTEMBER 17), 1987

Mr. EVANS (for himself, Mr. INOUYE, Mr. MCCAIN, Mr. BURDICK, Mr. DECONCINI, Mr. MURKOWSKI, Mr. DASCHLE, Mr. DOMENICI, Mr. HATFIELD, Mr. PACKWOOD, Mr. COCHRAN, Mr. HECHT, and Mr. BINGAMAN) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

---

A BILL

To amend the Indian Self-Determination and Education Assistance Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—ADMINISTRATIVE PROVISIONS

SEC. 101. SHORT TITLE AND TABLE OF CONTENTS.

This Act may be referred to as the "Indian Self-Determination and Education Assistance Act Amendments of 1987".

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TITLE I—ADMINISTRATIVE PROVISIONS

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Sec. 102. Declaration of Policy
Sec. 103. Definitions
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Sec. 202. Technical Assistance and Grants to Tribal Organizations
Sec. 203. Personnel
Sec. 204. Administrative Provisions
Sec. 205. Contract Funding and Indirect Costs
Sec. 206. Contract Appeals
Sec. 207. Savings Provisions
Sec. 208. Severability

SEC. 102 DECLARATION OF POLICY.

Section 3 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended by striking existing subsection "(b)" and inserting the following new subsection "(b)" in lieu thereof:

"(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy the United States is committed to supporting and assisting

Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.".

SEC. 103. DEFINITIONS.

Section 4 of the Indian Self-Determination and Education Assistance Act (Public Law 93–638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by adding the following new subsections (a), (b), (c) and (d):

"(a) 'construction programs' means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities but not limited to, housing, sanitation, roads, schools, administration and health facilities, irrigation and agricultural works and water conservation, flood control, or port facilities;

"(b) 'contract costs' means all direct and indirect costs which are necessary and reasonable for the proper and efficient administration of self-determination contracts;

"(c) 'contract funding base' means the base level from which contract funding needs are determined, and includes all contract costs;

"(d) 'direct program costs' means costs that can be identified specifically with a particular contract objective;";

(b) by redesignating existing subsections "(a)" and "(b)" as subsections "(e)" and "(f)" respectively;

(c) by adding the following new subsections (g), (h), and (i):

"(g) 'indirect costs' means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved: *Provided,* That indirect costs are determined by multiplying the amount of direct program costs by the indirect cost rate for such contract;

"(h) 'indirect cost rate' means the rate arrived at through negotiation between an Indian tribe or tribal organization and the cognizant Federal agency;

"(i) 'mature contract' means a self-determination contract that has been continuously operated by an Indian tribe or tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of such Indian tribe or tribal organization;";

(d) by redesignating existing subsection "(c)" as subsection "(j)";

(e) by striking existing subsection "(d)" and by redesignating as subsection "(k)" and inserting the following new subsection in lieu thereof:

"(k) 'Secretary', unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;";

(f) by adding the following new subsection "(l)":

"(l) 'self-determination contract' means an intergovernmental contract entered into pursuant to this Act between an Indian tribe or tribal organization and an agency of the United States for the purpose of assuring Indian participation in the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That no intergovernmental contract shall be construed to be a procurement contract; and"; and

(g) by redesignating existing subsection "(f)" as subsection "(m)".

SEC. 104. REPORTING AND AUDIT REQUIREMENTS.

Subsection (a) of section 5 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by inserting after the words "as the appropriate Secretary shall prescribe," the following: "by regulations promulgated under the Administrative Procedure Act (Act of June 11, 1946, 60 Stat. 237, as amended), consistent with section 102(d)(5) of this Act,"; and

(b) by changing the period at the end of the subsection to a colon and inserting the following proviso: "*Provided, however*, That for the purposes of this subsection, such records for multi-year contracts shall consist of quarterly financial statements for the purpose of quarterly advance payments, the annual single-agency audit required by the Single Audit Act of 1984 (Public Law 98–502, Act of October 19, 1984, 98 Stat. 2327), and a brief annual program report.".

TITLE II—INDIAN SELF-DETERMINATION ACT AMENDMENTS

SEC. 201. SELF-DETERMINATION CONTRACTS.

(a) Section 102 of the Indian Self-Determination and Education Assistance Act (Public Law 93–638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended to read as follows:

"SEC. 102. (a)(1) The Secretary is directed, upon the request of any Indian tribe or tribal organization, to enter into a self-determination contract or contracts with such

Indian tribe or tribal organization to plan, conduct, and administer programs, including construction programs, or portions thereof—

"(i) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended by this Act;

"(ii) any program or portion thereof which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto;

"(iii) any or all of the functions, authorities, and responsibilities of the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended;

"(iv) any program or portion thereof, including construction programs, administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

"(v) any program, or portion thereof, for the benefit of Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

"(2) Any Indian tribe or tribal organization may submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within ninety days after receipt of a proposal for a self-determination contract, approve the proposal unless a specific finding is made that—

"(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

"(B) adequate protection of trust resources is not assured; or

"(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.

"(3) Indian tribes and tribal organizations shall be entitled to contract for any program or function operated by the Federal Government for the benefit of such tribe, as provided in this section.

"(4) Upon the request of any Indian tribe or tribal organization that operates two or more mature self-determination contracts, the Secretary is authorized to allow such Indian tribe or tribal organization to consolidate such contracts into one single contract.

"(b) Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, he or she shall (1) state his or her objections in writing to the Indian tribe or tribal organization within sixty days, (2) provide assistance to the Indian tribe or tribal organization to overcome his or her stated objections, and (3) provide the Indian tribe or tribal organization with a hearing, under such rules and regulations as he or she may promulgate, and the opportunity for appeal on the objections raised.

"(c)(1) The Secretary is authorized to require any Indian tribe or tribal organization requesting to enter into a self-determination contract pursuant to the provisions of this title to obtain adequate liability insurance: *Provided, however,* That, except for liability for interest prior to judgment or for punitive damages, each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance.

"(2)(A) For purposes of section 224 of the Public Health Service Act (42 U.S.C. 233(a)), and chapter 171 and section 1346 of title 28, United States Code, with respect to claims for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under this section or section 104(b) of this Act, the Act of April 30, 1908 (35 Stat. 71; 25 U.S.C. 47), or section 23 of the Act of June 25, 1910 (36 Stat. 861; 25 U.S.C. 47), is deemed to be part of the Public Health Service of the Department of Health and Human Services while carrying out such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement.

"(B) Subparagraph (A) shall apply to an urban Indian organization, and to employees of an urban Indian organization, only with respect to services provided to Indians.".

(b) Section 103 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is hereby repealed.

SEC. 202. TECHNICAL ASSISTANCE AND GRANTS TO TRIBAL ORGANIZATIONS.

Section 104 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by redesignating such section as section "103"; and

(b) by adding the following new subsection (d) at the end thereof:

"(d) The Secretary is directed, upon the request of any Indian tribe or tribal organization, to provide technical assistance on a non-reimbursable basis to such Indian tribe or tribal organization—

"(1) to develop any new self-determination contract authorized pursuant to this Act;

"(2) to provide for the assumption by such Indian tribe or tribal organization of any program, or portion thereof, provided for in the Act of April 16, 1934 (48 Stat. 596), as amended by this Act, any other program or portion thereof which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921, (42 Stat. 208), and any Act subsequent thereto; or

"(3) to develop modifications to any proposal for a self-determination contract which the Secretary has declined to approve pursuant to section 102 of the Act.".

SEC. 203 PERSONNEL.

Section 105 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by redesignating such section as section "104"; and

(b) in subsection (e), by deleting the words "on or before December 31, 1988".

SEC. 204. ADMINISTRATIVE PROVISIONS.

Section 106 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by redesignating such section as "105";

(b) by changing the period at the end of existing subsection "(a)" to a colon and adding the following new proviso at the end thereof: "*Provided further*, That the Office of Federal Procurement Policy Act (Public Law 93-400, Act of August 30, 1974, 88 Stat. 796) and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contract.";

(c) by stiking existing subsection "(c)" and inserting the following in lieu thereof:

"(c) Any self-determination contract requested by an Indian tribe or tribal organization pursuant to section 102 of this Act shall be for a term not to exceed three years in the case of a new contract, and for a term not to exceed five years in the case of a mature contract unless the appropriate Secretary determines that a longer term would be advisable: *Provided*, That the amounts of such contracts shall be subject to the availability of appropriations: *Provided further,* That the amounts of such contracts may be renegotiated annually to reflect factors, including but not limited to cost increases beyond the control of an Indian tribe or tribal organizations.";

(d) by striking existing subsection "(d)" and inserting the following in lieu thereof:

"(d) Whenever an Indian tribe or tribal organization requests retrocession of the appropriate Secretary for any contract entered into pursuant to this Act, such retrocession shall become effective upon a date specified by the appropriate Secretary not less than one year from the date of the request by the Indian tribe or tribal organization at such date as may be mutually agreed to by the appropriate Secretary and the Indian tribe or tribal organization.",

(e) by striking existing subsection "(e)" and inserting the following in lieu thereof:

"(e) In connection with any self-determination contract or grant made pursuant to section 102 or 103 of this Act, the appropriate Secretary may—

"(1) permit an Indian tribe or tribal organization in carrying out such contract or grant, to utilize existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within his jurisdiction under such terms and conditions as may be agreed upon for their use and maintenance;

"(2) donate to an Indian tribe or tribal organization the title to any personal property found to be in excess to the needs of the Bureau of Indian Affairs, the Indian Health Service, or the General Services Administration, including property and equipment purchased with funds under any self-determination contract or grant agreement; and

"(3) acquire excess or surplus Government property for donation to an Indian tribe or tribal organization if the Secretary determines the property is appropriate for use by the tribe or tribal organization for a purpose for which a self-determination contract or grant agreement is authorized under this Act."; and

(f) by striking existing subsection "(h)".

SEC. 205. CONTRACT FUNDING AND INDIRECT COSTS.

Title I of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended by adding the following new section 106:

"SEC. 106. (a) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act—

"(1) shall include all contract costs incurred by such Indian tribe or tribal organization in connection with such contract;

"(2) shall not be reduced to make base funding available for any new self-determination contract;

"(3) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

"(4) shall not be less than the appropriate Secretary would have otherwise provided for direct operation of the programs or portions thereof for the period covered by the contract: *Provided*, That any savings in operation under such contracts shall be utilized to provide additional services or benefits under the contract;

"(5) shall not be reduced by the Secretary in subsequent years except by a reduction in Congressional appropriations from the previous fiscal year for the program or function to be contracted;

"(6) shall not be reduced by the Secretary to pay for Federal functions, including but not limited to Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring; and

"(7) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract.

"(b) The Secretary of Health and Human Services and the Secretary of the Interior shall provide an annual report in writing to the Select Committee on Indian Affairs and the Committee on Appropriations of the United States Senate, and to the Committees on Interior and Insular Affairs and Appropriations of the United States House of Representatives, on the implementation of this Act. Such report shall include—

"(1) an accounting of the total amounts of funds provided for each program or function for direct and indirect costs for new and mature self-determination contracts: *Provided*, That in the annual budget justifications the amounts of funds provided to Indian tribes and tribal organizations under self-determination contracts shall be reported for each program, line-item, activity or element and shall be reported separately from amounts for Agencies, Service Units, Area Field Operations and other Federal functions;

"(2) an estimate of the actual obligations of Indian tribes and tribal organizations for direct and indirect costs for self-determination contracts;

"(3) the indirect cost rate and type of rate for each Indian tribe or tribal organization negotiated with the Department of the Interior Office of Inspector General;

"(4) the direct cost base and type of base from which the indirect cost rate is determined for each Indian tribe or tribal organization;

"(5) the indirect cost pool amounts and the types of costs included in the indirect cost pools;

"(6) activities of the Department of Health and Human Services and the Department of the Interior in assisting Indian tribes to establish and administer indirect cost systems;

"(7) a list of requests for technical assistance made by Indian tribes and tribal organizations made pursuant to section 103; and

"(8) any findings and recommendations regarding needed improvements in the system of indirect cost funding.

"(c) For purposes of determining indirect cost rates in subsequent fiscal years for Federal programs that provide funding to tribes, other than the Bureau of Indian Affairs and the Indian Health Service, and which have statutory limitations on indirect cost reimbursements, Indian tribes and tribal organizations shall not be held liable for the difference between the amounts actually collected, and the amounts that would have been collected at one hundred percent of their indirect cost rate.

"(d) Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A-87, incurred for fiscal years prior to fiscal year 1988.

"(e) The Secretary shall give notice of any disallowance of costs within three hundred and sixty-five days of receiving any required audit report and shall provide for an appeal and hearing to the appropriate officials on any such disallowance. Any right of action or other remedy relating to any such disallowance shall be barred unless notice has been given within the designated period.

"(f) At least ninety days prior to removing any program from the Indian Priority System, the Secretary of the Interior shall publish in the Federal Register a notice of intent to remove or alter any program in the Indian Priority System, and provide a statement of the impact on base funding levels for each Agency and tribe affected.

"(g) Upon the approval of a self-determination contract and at the request of an Indian tribe or tribal organization, the Secretary shall add the indirect cost funding amount awarded for such contract to the amount awarded for direct program funding for the first year and, subject to adjustments in the amount of direct funding available for such contract, for each subsequent year that the program remains continuously under contract. Such combined amount shall be carried in the contracting agency's budget at the specific budget location of the contracted program for as long as the contractor continuously contracts such program.".

SEC. 206. CONTRACT APPEALS.

Title I of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by adding the following new section 110:

"SEC. 110. (a) Federal district courts shall have original jurisdiction concurrent with the Court of Claims, of any civil action or claim against the appropriate Secretary arising under this Act or under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any Agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder.

"(b) No self-determination contract may be modified unilaterally by the United States. Self-determination contracts may be modified only—

"(1) at the written request of a tribe; or

"(2)(A) if the Federal agency states in writing the reasons for the proposed contract modification and provides this written notification to the tribe ninety days in advance of the proposed effective date of modification; and

"(B) the tribe is afforded the right to appeal the proposed modification through the Department of Interior Board of Contract Appeals, or through the Department of Health and Human Services Board of Contract Appeals.

"(c) The Equal Access to Justice Act (Public Law 96-481, Act of October 1, 1980, 94 Stat. 2325, as amended) shall apply to administrative appeals by Indian tribes and tribal organizations regarding self-determination contracts.

"(d) The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978, 92 Stat. 2383, as amended) shall apply to self-determination contracts."; and

(b) by redesignating existing section "110" as section "111".

SEC. 207. SAVINGS PROVISIONS.

Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to Indian people.

SEC. 208. SEVERABILITY.

If any provision of this Act or the application thereof to any Indian tribe, entity, person or circumstance is held invalid, neither the remainder of this Act, nor the application of any provisions herein to other Indian tribes, entities, persons or circumstances shall be affected thereby.

The CHAIRMAN. Before proceeding I would like to introduce to you the members of the staff who are here to participate in the proceeding. First we have the staff director, Mr. Alan Parker, a member of the Chippewa Cree; next we have Doctor Patricia Zell, chief counsel of the select committee, a member of the Navajos; behind me we have Michael Hughes, a professional staff member, he is a Hopi Papago; then we have Joe Mentor, the minority legal counsel; then we have Mr. Daniel Lewis, a professional staff member, member of the Navajos.

Our first panel consists of: Suzan Shown Harjo, executive director of the National Congress of American Indians; Mr. Lionel John, executive director of the United South and Eastern Tribes; the Honorable Billy Frank, chairman of the Northwest Indian Fish Commission; and the Honorable Stanley Paytiamo, the Governor of the Acoma Pueblo Tribe. Suzan and gentlemen, welcome. Are you going to begin, Suzan?

STATEMENT OF SUZAN SHOWN HARJO, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS

Ms. HARJO. Thank you, Mr. Chairman and vice chairman and staff members. Thank you for welcoming us, and we will be welcoming you shortly to the convention in the other room, and we greatly appreciate your bringing your committee work to the people and giving the tribal representatives the opportunity to testify on this important bill—perhaps some people who would not otherwise have had an opportunity to testify.

I will only say a few words, and allow you to move on to that testimony.

I would like to say that this bill is a valiant attempt to deal with the situation as it is, and at some point, once we have corrected some of the interim problems, I believe it is vital that we get on to the structural problems and begin to do the things that will remove those vestiges of paternalism and allow for self-determination. I believe that it is only when Congress has changed the shape and structure and processes and practices within the Bureau of Indian Affairs and the Indian Health Service that we will be able to see that kind of future.

Once—as Indian people have called for—we have an independent regulatory agency of Indian Affairs and a trust council authority or some other kind of regulatory process and entity, then we will begin to see some changes. Until then, those changes will only be incremental. Yet, you see the resistance that you have been met with to even these baby steps. I hope that we can, at some point in the near future, begin collectively to examine those kinds of structural, far-reaching changes that can be made without doing violence or injury to the existing rights and protections that Indian people enjoy.

We look forward to this future work with the committee.

Thank you very much.

The CHAIRMAN. Thank you very much, Ms. Harjo.

Our next witness is Mr. Lionel John.

STATEMENT OF LIONEL JOHN, EXECUTIVE DIRECTOR, UNITED SOUTH AND EASTERN TRIBES

Mr. JOHN. Good morning, Mr. Chairman, Mr. Vice Chairman, and staff members.

I am Lionel John, executive director of the United South and Eastern Tribes. Again, this morning it gives me pleasure to appear before you and offer some testimony with respect to S. 1703, a very important bill, indeed.

I have a written document to present this morning, which your staff will work with, I am sure, and I will limit my comments to some oral remarks, particular points which we think need a little more comment.

S. 1703 certainly has come a long way from where we started, although this trail to get a better bill for Public Law 93-638 has been a long trail. It has been a very difficult time for all of us, I am sure, in bringing this bill to this point and trying to provide a better mechanism for Indian people to work with the Federal Government.

In this bill that we have in front of us today we have a few points that I want to emphasize, which I think we cannot relax upon.

Of course, as you mentioned yourself, Mr. Chairman, the indirect rate issue is of paramount importance. Indirect recoveries for tribes has been the major stumbling block as far as tribes being able to successfully operate programs or even consider operating programs. There just cannot be any deviation from strengthening the ability for tribes to recover the indirect costs.

Contracting has been a problem over the past 12 years of this legislation. I see the efforts that have been put forth in this bill look good. There is some good language in there, and I think it will help to improve the relationship that we've had with the two respective agencies, the Bureau of Indian Affairs and the Indian Health Service.

There has been some concern about the process of contracting, and I think some of the suggestions you have in the legislation will be very helpful.

There is worry from the tribes, yet, that the agencies are not yet providing enough technical assistance in areas of program development and administration. We think that the provisions for technical assistance need to be strengthened.

There probably also needs to be a provision that tribes will have flexibility in procuring technical assistance—that they can move freely and far and wide in order to find the help that they need. Too many times they are often held in narrow corridors and aren't able to seek the type of help that we need to really help things along. So keep that in mind, and if we can exact a language to get that flexibility that would be just great.

Another item that became quite important, particularly in recent times, has been the issue of the tort claims coverage, and specifically the problems of increasing costs in obtaining malpractice insurance coverage for providers. We have to have some form of relief. These costs are exorbitant. It is driving us out of business in trying to maintain the level of health care that currently exists.

I think that we have to work out a solution to afford the tribes the ability to get the tort coverage that the Federal Government, in fact, enjoys in similar situations.

A problem that has existed for some tribes in the past has been the ability to work out leasing arrangements with the Federal Government for facilities. There has continued to be a long backlog of projects that need funding, and construction of new facilities. But in some instances where tribes have been able to proceed on their own and build facilities out of their own resources, or other resources that they may acquire, there have been difficulties in the mechanisms that have been available to them, in that the tribes haven't been able to recover the monies that they have expended. These recoveries can be enabled on a much shorter basis in a leasing arrangement under this new provision. I think that needs some careful attention.

There was an article concerning the program savings, and I think the section speaking to that is quite good; however, there is one element in addition to savings that needs to be addressed, and that is the issue of program income.

On occasion a tribal health department is able to arrange program services in such a manner that they can generate income from other sources. We had to be careful of one particular aspect: while these tribes make these hard-earned efforts to get additional monies into the program, there isn't a back-door mechanism to offset what has been gained through this process. So we need to make sure that the language provides that we don't have a condition that whatever is gained can be lost through offset procedures.

There has been substantial language included on reporting. I know that has been a longstanding problem. We need to be careful in examining the implementation of the new reporting requirements once regulations are developed, and one of the things that has to be carefully sorted in the process is that over a period of time there is a potential that the reporting requirements which are the responsibility of the agency don't get transferred to the tribes in a process where the agencies pass through their responsibilities. I think that we have to examine that very carefully, probably be on an issue-by-issue basis. But we need to maintain a balance in that respect.

One other item which I wanted to complement my initial remark on, concerning indirect rate: it is my understanding that currently work is ongoing in the Senate Appropriations Committee to deal with the fiscal year 1988 appropriations. We have a report indicating the need for the Bureau of Indian Affairs indirect rate this year is about $50 million. We understand that last week there were indications that there would be a shortfall to that amount. I can't stress, again, strongly enough how important it is that we do reach the full amount necessary; otherwise it will be a shortcoming throughout the entire process. I think, from our end, I can assure you that we will do as much as we can to support you and to support the committees in trying to reach the full amounts that we need in order to make this entire process work. We will do what we can to help out in this situation.

Again, I think that the work has been very good up to this point, and I can only hope and pray that we will reach a time when we can celebrate the arrival of new amendments that are going to make things a lot better for our work in dealing with the Government programs.

I want to thank you for this opportunity to come before you this morning, and I urge that we continue to work together, and that you and your committee move as expeditiously as possible to bring us a good bill this year.

Thank you, Mr. Chairman.

[Prepared statement of Mr. John appears in the appendix.]

The **CHAIRMAN**. Thank you, Mr. John.

Now we have the Honorable Billy Frank, chairman of the Northwest Indian Fish Commission.

STATEMENT OF HON. BILLY FRANK, CHAIRMAN, NORTHWEST INDIAN FISH COMMISSION, ACCOMPANIED BY WILLIAM RON ALLEN

Mr. **FRANK**. Thank you, Mr. Chairman, Senator Inouye. I see our Senator from the State of Washington, Senator Dan Evans, and the committee members.

I am Bill Frank, Junior, chairman of the Northwest Indian Fisheries Commission. My comments are pretty simple. You have our testimony in front of you.

I would appreciate it if you would acknowledge Ron Allen who is on my right, who is on the task force of 93638 that helped move some of these things along.

We appreciate the committee and all of its help on trying to move these amendments forward, and maybe making a little better day for the Indian people in our nation.

I want to say one thing: we are not looking for new money. It is just the same money, only trying to make it move through a little smoother from Congress to the Indian people. In so doing that we have a lot of disruptions along the way; for example, the Bureau of Indian Affairs.

This morning the U.S. policy is self-determination, and Congress's policy is self-determination for Indians. The Bureau of Indian Affairs takes that away from us, in a sense. I just wanted to comment on that.

Government-to-government, tribes self-sufficient—we're trying to work, and I think these things have probably been stated before, but the Indian people feel that we have a hard time getting our money to us. We have a hard time getting whatever—we go to Congress, we get the money, and along the way it doesn't show up.

You heard some of the testimony about indirect costs. That is a big problem. We have problems all along the way when it comes to the Bureau of Indian Affairs.

Today I am kind of relating some of these issues on the fisheries issues in the Northwest. The Bureau of Indian Affairs continues to take our money—our money—saying the money that is appropriated for fisheries management in the northwest on the Pacific Coast, from Alaska to Mexico, and putting the fisheries back together, managing those fisheries, taking part in those fisheries in cooperative, and putting the anadromous fish back into the streams, taking care of the streams—it covers a whole lot of different management areas.

The Bureau of Indian Affairs takes a big chunk of that money to start their own fisheries department, and we have our fisheries department. They also hire technical people. So those are things that it seems like we are duplicating. Indian tribes want to get self-sufficient, they want to have their own technical people right at their hands. They are on those streams that are managing all of those resources that are on the streams; and yet, in Portland, Oregon, and throughout the Nation, the Bureau has their own fisheries people. It gets out of hand. I think they need somebody there to kind of coordinate things, but they surely don't need a blown-out fisheries department with a whole lot of technical people in it.

That money comes from our budget. It comes from the tribes' budget in the northwest. But that is just one example.

The request for $10 million is short for indirect costs. The current funding level is 70 percent for indirect costs. The tribes need 100 percent. It is another way short of things.

Tribes go broke, they go bankrupt. How can you go bankrupt with the Federal Government as your trustee? But we do go bankrupt. A lot of it is on indirect cost of the unstable situation in the Bureau of Indian Affairs and the people we have to deal with up there in the central office and throughout the area office. There is no stability, whatsoever, when it comes to dealing with Indian people.

Those are just some of the things that I wanted to touch on today.

We appreciate, Senator, your committee. It is a committee that has taken—I've surely noticed that the select committee has changed. It is a highly professional organization now that can only mean to us, as Indian people, that it is going to be better for us.

I hope that these amendments, and I hope that the bill that is introduced will pass, and that it will make things a little bit smoother. It won't solve all of the problems, but it will make a little smoother way for the Indian people out there.

Thank you.

[Prepared statement of Mr. Frank appears in the appendix.]

The CHAIRMAN. Thank you very much, Mr. Frank.

Speaking in behalf of the All Indian Pueblo Council, I am pleased to call upon the Honorable Stanley Paytiamo, the governor of the Acoma Pueblos. Governor.

STATEMENT OF HON. STANLEY PAYTIAMO, GOVERNOR, ACOMA PUEBLO TRIBE

Mr. PAYTIAMO. Good morning. Thank you very much. I have a prepared statement, and you have a copy, on the summary and review of the proposed amendments to Public Law 93-638 regulations, the All Indian Pueblo Council/Tribal Administrators management has this summary to go over.

My name is Governor Stanley Paytiamo. I am with the Pueblo of Acoma. I am here representing the All Indian Pueblo Council.

It is the general consensus of participants in this review meeting that most of the issues of concern to the various tribes are adequately addressed in the proposed amendment. There are, however, a few items which need emphasis, and they include the following three items: Appropriations, budgets, and allocations of appropriated funds.

Past and current budgeting systems, especially the BIA's, have been anything but effective. The tribal budgeting system should be based on the realistic needs of the tribe, and need to justify appropriation requests. The current Indian priority system does not have this effect and needs to be changed so that it does, namely the ZZB.

It is recommended that the budgeting process and allocation of funds to Tribal contracts be free of the Government agency's requirement to maintain certain levels of FTE's. It has been the experience of some tribes that this requirement has been a major obstacle in getting tribal contracts approved and implemented on a timely basis.

It is recommended that the concepts of funding utilized within the Administration for Native Americans, the budgeted block system, revenue sharing, or any other system which, in fact, provides a real opportunity to plan and implement their programs based on their needs and their abilities to administer them.

Two: regulations. It must be pointed out that the tribal governments today are dealing with a lot of different agencies of Federal Government. Our recommendation is that such agencies adopt uniform, simplified, straightforward, uncumbersome regulations to be applied to Tribal contracting.

Three: liability insurance. The provision in the amendments which requires tribes to obtain adequate liability insurance is not an acceptable one. The provisions relating to the public health citing that the tribal organizations or Indian contractor carry out a contract, grant agreement, or cooperative agreement under this section is deemed to be part of the Public Health Service of the Department of Health and Human Services, by carrying out such contract or agreement and its employees—including those acting on behalf of the organization or contractor as provided in—as deemed employees of the services who are acting within the scope of their employment in carrying out the contract or agreement. This provision is more acceptable and should be applied to contracting agencies.

Senator, as it was mentioned in the indirect costs area, currently those of us in the Albuquerque area have 638 contracts in the area of law enforcement, social services, in court. When we negotiated the contracts we were advised that we would only get one-third of the indirect costs, and they will give us the balance of the indirect costs if and when the Bureau of Indian Affairs received the balance of the appropriation. Just within the last month the contractors in our area have been advised by letter indicating that the balance was not forthcoming. So we were advised that in order to meet the balance of the indirect costs, the tribe would have to cough up the balance, or dig into the direct costs. This, Senator, we object to.

My tribe has gone along with what the BIA had requested, but in protest. I think that when the tribe contracts for a certain 638 program, there should be adequate funding to go along with it so that the tribe is not put in a financial bind.

Thank you very much.

[Prepared statement of Mr. Paytiamo appears in the appendix.]

The CHAIRMAN. Thank you very much, Governor.

At this juncture I am pleased to announce to the gathering here that the Senate select committee will have a markup of this measure a month from now on October 21. At that time the committee will debate and discuss every provision in the bill, and hopefully we will pass on this measure and recommend its favorable consideration by the full Senate. I am very confident that that will happen.

We are fortunate to have with us this morning the author and the chief sponsor of this measure. He, as Governor of the State of Washington, has had much experience working with Indian tribes and nations in this area. Further, because of his long established interest and sensitivity to Indian matters, he has been very cognizant of the problems that you have been facing. Therefore, it was natural that he would be the chief author and the chief sponsor of this measure, and we on the select committee are all pleased to join with him.

I would like to call upon Senator Evans now, as the chief author, to begin the questioning.

Senator EVANS. Thank you, Mr. Chairman.

First, Mr. John, you mentioned the indirect cost recovery which, from all of the panel, seems to be a significant and continuing problem. If I remember your words, you said that there was a worry that the agencies are not providing enough technical assistance; we need to strengthen that technical assistance to the tribes. Do you have any more specific advice as to how we might do that, or what might be necessary to do in the bill that we are considering that would aid you in that process?

Mr. JOHN. Yes, Senator Evans. There are probably a number of methods that need to be applied in this process. Part of it was touched by one of the other witnesses in indicating that the agency has a problem as far as the placement of staff. There is a problem in the contracting process when a tribe takes over that often the Federal employees are reassigned or moved about, and I think that part of that was felt to be dealt with by the time process of giving a little more time in the contract arrangement process to place these people.

In many instances tribes are willing, and often happy, to take placement of Federal employees into their systems, but there is a process that has to be applied for that to make that work. That needs to be put in detail how that would occur. Right now they have the IBA system, but I understand the IBA system has some difficulty as far as time lines—how long a person can be IBA'd, and how that process works.

There is, of course, the commission core that provides a lot of staff for the Indian Health Service in some instances. Of course, in the past commission core has been targeted for extinction, I guess, and there is a retirement provision now in commission core. There doesn't seem to be adequate provision for these people to transfer over to tribal programs even when they are asked for.

Directly, through working with the area offices, sometimes the area offices have either shortages of staff or disproportionate work loads, or whatever problems they may incur. But often the assistance that tribes are looking for from the Indian Health Service area offices is just not forthcoming in a timely manner, so tribes are left sitting with a situation sometimes for indefinite period of time before they can get someone in to help them out.

I think based on that particular point is where my suggestion came about that perhaps tribes should be given an opportunity to go to other entities—business people, whoever it be—that may have expertise in particular areas. Just for an example, perhaps it might be a financial management problem that the administration is having difficulty with. They might want to enlist the support of some accounting firms.

Under the old system, of course, with the procurement regulations that were in place, it would take sometimes an intolerable amount of time before these arrangements could be put in place. In the meantime, the problem just continues to magnify. To boil it down and correct it after some help comes in has caused considerable damage to an operation. I think the tribes have to have that flexibility so that if they can't get the help directly from an area office right at the particular time it is needed, they should be able to seek out other sources for it and have that open access to procurement for that type of support.

There probably are other problems that I haven't thought of at this instant, but that is about the nature of things that we are looking at.

Senator EVANS. Is it typical then, that if you have a certain program that is being carried on, with the Bureau of Indian Affairs and their management and funding, and then you shift that same program into a self-determination contract, that at that point the tendency is to loose access to the technical people that the Bureau and others have, and at the same time have such difficult contracting circumstances that you can't move effectively elsewhere to get them?

Mr. JOHN. That's right, Senator.

Senator EVANS. We certainly will try to handle the latter by streamlining and straightening out some of those processes; but in many instances you would just as soon have the continued technical assistance of people that may have been working through the bureau or through the Indian Health Service if they could be transferred or could have an extensive enough period of transfer that it would be effective?

Mr. JOHN. Yes; I believe so. In certain isolated instances I suppose there might be difficulty, but generally speaking I think that from indications I have heard, that is an acceptable solution.

Senator EVANS. Billy, do you have any comments or any particular problems along this same line?

Mr. FRANK. On fisheries issues it is a little bit different in our area up there. The 20 tribes on the western side of the mountain have the Northwest Indian Fish Commission. When we started, we were in the fisheries management, and we rode the back of the State of Washington, and we rode the back of the U.S. Fish and Wildlife until we got our technical people in place, and our policy people, and put our commission together to where it is today. Then we got off of their back, and now we contract with the Bureau of Indian Affairs and Fish and Wildlife to take over these programs directly, and it is working for the Indian country and fisheries in the northwest because the Indian tribes have the technical people right on hand all of the time. We were not to the goals of where we are going, but we are slowly getting there.

Senator EVANS. Thank you, Mr. John.

You also mentioned the problems of program savings on the one hand, but then program income, which brought up something that I haven't thought about and does need to be addressed by this bill. Do you have any idea how extensive that kind of thing is? Do we have many cases throughout the country where there is program income that is being subject to an offset by the bureau when that program income is available?

Mr. JOHN. I personally haven't had any experience in that respect, Senator Evans; however, I have understood there are reports in certain situations where there have been offsets of certain types of income. I think, perhaps, a later witness from another area might speak to that, I hope. I understood that the Bureau of Indian Affairs had offset some timber income that was generated from the tribes, but I don't personally know that much about the instance, but there is a situation.

I think what I was pointing to, more specifically, is the fact that in some instances there are savings, for whatever reasons, programs arrive at the end of a fiscal period with a particular saving. They should be allowed to use that saving into the subsequent year without any offset.

On the issue of income, probably the start-up tribes who are only a few years into a program may not experience those. I think the category that was defined of mature programs are more likely to be in that category where they have arrived at a point where they are starting to access additional resources, and through that process can generate income. In some they could be charging private insurance for clinical services, which is additional money coming into a tribal clinic, and that money should be allowed to stay there so that it could be used for whatever the needs of that tribe are. Probably a more prominent need in that respect would be for improvements right in their facility—whether it be renovation, addition, buying additional equipment—and I don't think that we should leave it.

It seemed to me, in looking at the bill, that it was kind of open-ended on that particular part, and it didn't seem to provide the kind of protection I was looking at to help this happen. I hope that helps you.

Senator EVANS. Sure. Yes, it does, indeed.

Billy, you mentioned that money from the BIA comes from the tribes' money, and I think that's useful for us to have on the record, especially as we are talking about this whole question of self-determination and contracting and the indirect cost elements of it. Would you care to go into a little more detail as to what you see happening under current circumstances? You know, when you get to the point where the bureau thinks there isn't enough money, whose hide does it come out of? How do they operate? What is the procedure in this whole indirect cost problem?

Mr. FRANK. What the bureau does is: we go to Congress and we get an appropriation of $1 million for the fisheries issues in the northwest. How we get that money to the tribes is through a line item that it goes directly to a fish hatchery. Let's say a fish hatchery needs $100,000 to keep the operation going, and so on. Well, that money goes directly down, but then the other money comes sailing through, and in a lot of cases it never gets there.

When it comes to coming short—now, there's money going to be short here—then they start robbing the other tribes, or other programs throughout the Nation, and then they get us all in a battle over whatever the funding is, and then you might come out on top, but somebody is going to come out on the bottom. In a lot of cases there is no stability, I guess, Senator, in Indian country when it comes to managing fish, our resources—whether it be timber or anything else. There is no stability working with the Bureau of Indian Affairs. It is just an up and a down and an up and a down. I hope some of these amendments—could Ron touch on some of this, maybe?

The CHAIRMAN. Could you identify yourself for the record?

Mr. ALLEN. My name is Ron Allen. I am the chairman for the Jamestown Klallam Tribe, and I was also the chairman for the Affiliated Tribes Task Force on Public Law 93-638 in the indirect cost issue.

To get back to your question on what would happen to the tribes with the present situation: the present situation dictates that there are not enough funds to fund 100 percent of our indirect costs. What happens to the tribes is that they have to supplement the deficiency of the amount of money with their own hard dollars.

Now, the problem is: if a tribe has resources, then it is fine, with the exception that they would lose the access of those resources to some other venture that they may need to pursue, whether it is some economic development project, or whatever, or some project which they can't fund through any kind of program. It may very well be a culture program.

But for smaller tribes who have very few or very limited resources, or organizations that do not have any resources to their availability, then what will have to happen, through the existing process, they would have to reduce the amount of direct programs in order to pay for the indirect costs to administer the program. So the over all effect is a reduction of the services that the tribes are rendering, whatever the programs are.

So there is a cost to the tribes either way, whether it is utilization of their own hard resources, or whether it is just a reduction of the direct programs. It is a penalty to their tribes because they are not able to recover the full amount of money they should be recovering for administering these contracts.

Senator EVANS. You also have a situation—or does it occur at all or frequently that there will be a contract, and at the beginning there will be a certain cost recovery stated, and then later on, during the course of the contract, that indirect cost recovery would be reduced?

Mr. ALLEN. It can happen, yes. I mean, something could happen during the course of the fiscal year where they may have had a reduction of contracts, or else an addition of a contract—probably more likely—by which they could reduce the administrative overhead cost, the indirect cost, itself. But that doesn't necessarily mean that it can offset it. If it doesn't happen, you know then it still won't offset it sufficiently so the funds could meet the funds the tribe should be receiving for those contracts and grants. So, it can happen, but it is unlikely, because the availability of funds, for it to happen, is simply not there. It is less likely to happen.

Senator Evans. Well, I'm thinking of a case where the Bureau of Indian Affairs may say, "For this particular program you will get 70 percent, 80 percent, whatever percentage in indirect cost recovery," and you depend on that, and then during the course of the contract are there occasions when they may decide they are short of money, for whatever reasons, and reduce that percentage that they get back to you?

Mr. Allen. Yes; they have done that. In fact, that is their present policy right now. At the end of the year—what they're doing is taking forever throughout the fiscal year to actually get the indirect cost to the tribes and in their contracts. So at the end of the year, when they are finally making their tallies about how much money their tribes need for their indirect costs—the funding, itself, for the support costs—and they figure out that they don't have enough funds, then they say, "We'll going to have to reduce the amount of funds that we're going to give you." And that happened last year. They started off by saying they were going to provide the tribes with 92.5 percent of their need; by the time the end of the year came around they were appropriating something like 68 percent. So if you were budgeting to get that money, and you were spending it accordingly, based on projection, then the tribe is going to have to figure out how to pay for that cost. A lot of tribes have suffered severely because of that. It makes it very difficult for us to maintain the contracts and the services under those kinds of conditions.

Senator Evans. I can't imagine that that occurred because there was less money actually appropriated to the Bureau then they were originally planning on. That might have been, but I—usually I think Congress ends up appropriating more than the Bureau asks for. But why the reduction, then? Are they just engaged in more programs than they thought they were at the beginning, or do they have more costs at the head offices?

Mr. Allen. I think there are a couple of problems that cause that. The Bureau is having a very difficult time getting a handle on the indirect and giving the accurate figures of the contracts the tribes are entitled to. Because of the ongoing process of deficiency of applying for funds, or requesting funds from Congress, they are behind the eight ball.

As they try to get a handle on how much funds these contracts need, by the time they get into the fiscal year they realize that they are further and further behind, and during the year they could easily have implemented some additional contracts which have indirect costs associated with them. Right now the direct that they have is not to come back to Congress to add on supplemental moneys to cover those costs. They seldom ask for the adequate amount.

They are never asking for the amount of money that will restore the indirect cost at the 100-percent level. They have this ongoing policy that the level they are shooting for is 92.5 percent of the need, which is, in our judgment, very questionable, because if we are supposed to recover 100 percent, which we feel is reasonable—and we keep trying to remind the BIA that those numbers—they get intimidated by the percentages that they see across the Nation, everything from the low percentages up into over 140 percent—they get caught up in the percentages, but the actual dollars that the tribes receive for indirect, the one-third of the money that comes down to the tribes is really a small portion of the money for the tribes to carry out the responsibilities. That's how we carry out self-determination policy, and if we are not provided that kind of money—the money that we have a right to, just the same as the U.S. Government—then we can't do it.

They don't budget it, and they don't seem to be able to get the numbers to Congress so that Congress can appropriate it. So when Congress does appropriate additional money or supplemental money it is never quite enough, and they are always further and further behind the eight ball.

Senator EVANS. The opens up a whole new line of questioning that I'm sure we'll ask when we get the BIA in front of us on this same bill.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Mr. Allen, I think you are one of the most knowledgeable among the Indians on this matter: what is the funding situation for contract support for fiscal year 1988?

Mr. ALLEN. Well, like Mr. John said, the request that has been made is for $50 million, which would give the indirect cost contracts—it should be able to restore the contracts to the 100 percent level, which would allow the tribes to get back on track they way they should have been back in fiscal year 1985.

There are two other portions to those funds, and for small tribes they utilize two programs, one is called "self-determination grants" and another one is called "core management grants." They utilize those for supplementing the indirect cost for the true indirect cost.

Right now, where we are is—it is my understanding that the mark-up reduced it from $50 million down to about $44 million, and the problem is that that is a deficiency of $6 million, so if that went forward the indirect cost of the programs would already be deficient by $6 million—whatever that percentage would work out to be—for the indirect costs.

Now, for the self-determination grants we requested your committee to request $50 million to restore to the fiscal year 1987 level. They reduced that to $4.5 million. Last year's level, fiscal year 1987, was $7.8 million. So that would mean that we would be going into fiscal year 1988 with a reduced level everywhere, and the same circumstances that we described in terms of what will happen to the tribes and the organizations will happen: there will be a reduction of services, there will be a reduction of programs, there will be a cost to the tribes for their own hard cash to supplement the Federal programs.

So what we are requesting is that it be restored to $50 million, and at a minimum that self-determination grants could be restored to the 1987 level. Now, it is our understanding that the core management has been requested at $3.8 million. We know that is what the House had recommended, and we feel we could probably live with that, but we know that there are some unknowns out there, because we know that the Bureau had targeted $6.8 million.

We know, also, that there are a number of small tribes who were always eligible for the program but never applied, not having knowledge about it, not having the expertise to put together the grant application for those funds that they need to supplement this program. So we don't know exactly how that will shake out when they try to implement that program, so that is why the combination of the two—the self-determination and the core management—is important for the smaller tribes, and there are a couple hundred of us out there.

What happens is that the core management is designed to address indirect costs; self-determination was designed to address a lot of issues for self-determination objectives. So with the need for indirect costs, a great deal of the tribes chose to use those monies to supplement indirect costs because that was their highest need at the time. That doesn't necessarily mean that they couldn't use those funds. If adequate funds were in the core management program to address indirect costs, then they could have used those grants for other economic development ventures or administrative projects, administration buildings, or renovation projects that they need to get their programs on a stable base.

Where we are is that we do need the indirect costs, at a minimum, to come back in at $50 million. We do request that self-determination grant is restored at a minimum of the 1987 level.

The CHAIRMAN. Next week the Appropriations Committee will be marking up the Department of Interior appropriations, and, as most of you are aware, this is where the BIA funds are located. Unfortunately, the subcommittee having jurisdiction over these funds, upon conferring with officials of the Bureau of Indian Affairs, decided that in order to stay within the budgetary constraints determined by the Budget Committee they would reduce the BIA account by $100 million. In making that decision, a close analysis of the cut will show that most of the cuts come from Indians programs and not from the Bureau's operations.

I will be appearing before the Appropriations Committee to reverse this, and secondly to restore most of it. I assure you that I will do my best to restore those funds.

As most of you are aware, I represent a State with no Indian reservations. There are many Indians—members of your tribes—who are my constituents, but no organized tribes or nations. Therefore, the state's dealing with the BIA has been at a minimal level.

Like most Americans, in viewing the BIA it was my assumption—and I think a valid one—that this bureau was established to help Indians, that it was there to expedite and assist Indians in carrying out their programs. But since my membership on this committee, and especially since assuming the chairmanship, I have concluded that this bureau, with its bureaucracy, has done more to impede the progress of Indian nations and tribes than anything else, and, therefore, this committee is fully supportive of the efforts of Governor Evans, and we intend to pass this out on October the 21st as our first step. Our second step, as Senator Evans indicated, will be to have a little discussion with the Bureau of Indian Affairs, and if we are not satisfied with the discussion we will make a few changes.

I thank you very much. [Applause.]

Our next panel consists of: the Honorable Joseph DeLaCruz, president of the Affiliated Tribes of Northwest Indians; Mr. Clarence Skye, the executive director of the United Sioux Tribes; Ms. Margaret Roberts, board member, Alaska Native Health Board; and the Honorable Anthony Drennan, vice president, Inter Tribal Council of Arizona.

For those of you who are interested, the select committee will have the BIA before it on October 2. I would suggest that if you are in the Washington area that day you stop by and see what we do.

President DeLaCruz, will you begin?

STATEMENT OF HON. JOSEPH DeLaCRUZ, PRESIDENT, AFFILIATED TRIBES OF NORTHWEST INDIANS

Mr. DELACRUZ. Thank you, Senator.

For the record, my name is Joseph Burton DeLaCruz, and I am the president of the Kowalt Nation, and I'm offering testimony here today as the president of the Affiliated Tribes of Northwest Indians.

Senator Evans, it is an honor to hear your comments on the previous panel.

The Affiliated Tribes, in working with the Northwest Indian Health Board, has had a task force that has met with your staff analyzing our problems with the self-determination act and with the various amendments we are looking at today. I really felt good about the comments you made of taking a look at not only the amendments, but what happened last week in the appropriations.

For over 20 years now I have been the chief administrator of the Kowalt Nation contracting with the U.S. Government. Before the Indian Self-Determination Act went back, and the Buy-Indian Act. It is a wonder that an Indian leader can stay sane with the changes and frustration of people within the Administration that keep changing the rules of the game.

I have an extensive testimony that I worked with our task force to put together for the Affiliated, but I am going to highlight that testimony.

The CHAIRMAN. Your prepared statement will be inserted immediately following your oral presentation.

Mr. DELACRUZ. In the last 20 years, in dealing with contracting with the Federal Government I want to point out some of the things that really have been frustrating, and some of the previous panel members have touched on them, I've touched on them in previous testimony as the chairman of my tribe and as chairman of the National Congress of American Indians.

I was directly involved in the policy discussion leading to the original Indian Self-Determination Act. Those were exciting times, full of expectations. Tribes have had successes and failures in 638 contracting, and the BIA and IHS have had their difficulties in transforming from service agencies to contracting agencies. Hopefully these new amendments will resolve some of our mutual mistrust and tension.

Unfortunately, the self-determination policy is not reality.

Presidents Nixon and Reagan, as well as Congress, have spoken eloquently about Indian self-determination.

There are two major issues I would like to address today in this hearing. The first one covered in my testimony is the stability of tribal governments. The second issue: involvement of tribal leadership in the consultation process if we are truly in a government-to-government relationship with the United States.

On the stability of tribal governments: tribal budgets are based on the administration's request as part of the Federal process. Thousands of staff hours and millions of dollars are wasted annually on preparing budgets based on administration requests which rarely reflect reality. Tribes are caught between what the president proposes and what Congress eventually disposes.

The BIA and IHS rarely ask for necessary funding to meet the needs. For example, the BIA—which has been discussed very openly by tribal leaders—cost only requests about 70 percent of what is needed on indirect costs; yet, through the regulations and structure that was set up by OMB on negotiated rates, you would think by now, after 10 years of contracting, they could make better budget projections.

IHS: the majority of the tribes in the country are on a priority-one basis, working with IHS on their one RAM/SURAM information system. Their own information system points out that they are only meeting 60 percent of the requested funding needs of Indian people. They don't have a process for identifying the dollars needed for 638 contracting.

We spent three national meetings with IHS last year looking at their distribution process. They had various formulas they asked us to look at—they weren't adequate. What they were asking us to do was look how we distribute equally 60 percent of what is there, and self-determination keeping the people on a starvation diet doesn't move them forward toward any type of self-determination.

There are two recommended legislative changes that I'd like to speak about. One of them is on budget and planning systems protecting tribal-based funding and involving tribal participation.

It has been our experience through the last several years—at least in the last 3 or 4 years—that we get a lot of lip service to consultation, and mostly as people come out from Washington or send information out to the areas, meet with tribes, and point out what they are proposing and ask what we think of it. It is not a proper dialogue as far as a relationship with tribes and the U.S. Government.

There is a process set up—and it has been set up ever since they passed the act with the OMB regulation circulars. IHS is not following them. The process is actually there for a full recovery of actual costs that are funded to tribes, even taking exception the unique differences of tribes. It seems like if we could get the people that contract in the Federal Agencies to at least work with us and get a proper dialog—maybe we need to educate them on their own process and their own system, because that seems to be where the failure is.

The BIA and IHS, time and time again, have rejected a policy of proper consultation. Although I have said in other testimony in other committee hearings we've slowly developed a better relationship in consultation with IHS, it seems like when we get moving toward a proper dialog with IHS over administrative problems with IHS, the higher level that IHS has to listen to changes the rules of the games again.

Last week I received, as the chairman of my tribe, a request to again look at various formulas to distribute the 60 percent of the dollars that they have for 1988 contracts, which is unquestionable. You can't contract if you are only receiving 60 percent of what it takes to administer a program. If you do, you are designed for failure. I'm hoping that next week, as they review the budgets, that these dollars can be restored.

I want to commend this committee, and I want to commend the staff that you have brought together for the Senate Indian Affairs Committee, for their work for the tribes on developing amendments and trying to understand this problem. To me that is a proper way of consulting with tribes, and your staff and this committee has been one of our best relationships, in my experience, that we have had in years. I want to thank you, Senator, and I want to thank Senator Evans.

Last Spring, I believe it was, we had our task force come back and meet with your staff in the Senate at a hearing, and they prepared some options to take a look at how to recover full funding for stability of tribal governments with existing budget situations, recognizing that the United States has to look at what is appropriate. They offered, after a lot of work, some suggestions within the existing Bureau budget to find about $20 million. If you have to go to battle for us, as you say, next week, I hope that you will take a look at the suggestions that were put together by that panel, because we feel that there is room to do that without having the Bureau again hold back dollars.

Again, related to Public Law 93-638, with the help of your committee we got a 1987 supplemental. As of last week, of the supplementals that came for the 1987 appropriations, some of those still weren't out to Indian country, and the fiscal year is almost over. They have been holding certain portions of those monies back in the central office for I don't know what as far as distribution. I don't know if that is part of the administrative sequestering of money or what, but tribes are sitting out there in various areas on priority one funding for health, they are sitting out there in areas of child welfare that there are supplementals, and those dollars haven't been distributed yet.

I want to thank this committee for giving me the time to testify. If there are any questions I would be happy to try to answer what I am capable of answering.

Thank you, Senator.

[The prepared statement of Mr. DeLaCruz appears in the appendix.]

The CHAIRMAN. Thank you very much.

Our next witness is the executive director of the United Sioux Tribes, Mr. Clarence Skye.

STATEMENT OF CLARENCE SKYE, EXECUTIVE DIRECTOR, UNITED SIOUX TRIBES

Mr. SKYE. Thank you, Mr. Chairman. I appreciate your efforts as chairman of the Senate Committee on Indian Affairs, and also those of Senator Dan Evans, the author of the bill. I appreciate your bill because it does hit a lot of key areas.

Tribes, at this point in time, are in real strife, and having a lot of difficulty in how things are done. We have been at this for a few years—ever since the inception of the Indian Self-Determination Act that came into being in 1976.

I also want to recognize your staff, of course.

There are some things when you present your indirect cost proposal and you spend your time assuming that you're going to get all these programs, and really there is no money there. You are saying that you're going to have so many dollars to spend in your central administration. Really, you are assuming a lot because you have got to spend the money before you can get the money.

When the year ends and the dollars and the programs are all totalled up as to what you spent, you send your deal in to IG, and they come back and tell you you've got a carry-forward, and that carry-forward is what you are supposed to pay back to the government. You really don't pay it back; it is just an exchange of paper. But that has affected your third year.

This is 1987. If you've got a carry-forward in 1985 then you've got to reduce your indirect costs because you can only spend one-half, or whatever the amount of dollars—let's say you owe $10, $20, $30, maybe $50,000 to the Government, then you've got to turn around and you can only spend the portion that Inspector General allows you, and I would hope that you would address that in your bill so that the carry-forward is waived. Otherwise, there are tribes that have to go in to Inspector General and say—some tribes in our area, the Aberdeen area say that they would go to Inspector General and ask for a waiver and then request a flat rate. Well, the Inspector General comes back and says, "If your indirect cost rate hasn't been consistent over the past 10 years or the past years then we're not going to allow you flat rate, plus you have to pay the carry-forward."

Well, it gets real complicated, and you've got to go to the bank, and say, "We would like a line of credit based on the amount of money that we think we're going to receive" and they say, "Well, you haven't got the money, so therefore we are not going to allow you a line of credit."

There is another area that is devastating. Rules and regulations—and I'm glad you are addressing that in your bill. Many times you, as Senators, and of course the House side, make up the laws. We follow those laws. But the federal agencies make up the rules and regulations. They do the interpreting, so we've got to follow those interpretations. If they decide that we've got to pay back the money, we've got to pay back the money. Somebody in Washington, in the Bureau of Indian Affairs and Indian Health Service says, "We're not going to contract with you because you're not capable."

The other area: my suggestion would be that Congress, after the rules and regulations are made up, has those rules and regulations sent back to Congress or your staff on the Senate Select Committee for approval. Somebody has to watchdog those people because they are getting out of hand, and things are getting tougher and tougher, as it is for the farmers out in our area.

Another area is that other Federal Agencies do not participate in indirect cost programs. For example, the Department of Labor will provide you a grant, and when you get that grant and it is approved everybody is happy, but they only allow you 20 percent administration within that grant, and if you've got an indirect cost rate of 20 percent then you can only take one-half of that administrative portion of the grant, or whatever they allow you or whatever they fight over the money with.

I would hope in your bill that you would address other Federal agencies, including them in the Indian Self-Determination Act amendments so that they have to participate in the indirect cost portion of this rule. And this is where tribes are getting into trouble. They cannot recover all the money they need to recover in their program. They submit it to the Inspector General's office, he comes back, he doesn't care whether the other Federal agencies participate or not, so then he says, "You didn't collect all of it." So then that is where you come up with the carry-forward, and then you are waiting for the guillotine to drop on you.

I would hope that would be brought over all Federal agencies, because the tribes and the organizations that are participating these days with every Federal agency they possibly can.

If I sound a little nervous, I am.

The other thing is that the indirect cost—when you get a contract, for example, you get a contract for $100,000, they don't any more—I guess the Bureau of Indian Affairs or someone else determined they can't provide the indirect costs above and beyond the program. So you take the indirect cost, as we're told, out of the program, so therefore it reduces the services to Indian people. So then that is very difficult and cumbersome to handle.

I would hope that the committee would address that, and my recommendation would be to allow additional money that the tribes would need to do the program.

The Bureau of Indian Affairs, in many cases—somebody down the line, a GS-12 or GS-11, will decide how that program is going to be carried out, and the top level management people will follow through.

I would like to see that the money restored—I guess the Bureau of Indian Affairs presented a budget for $42 million, and it was cut—I guess there was $100 million cut out of the Indian Self-Determination Program. I'd like to see that restored to $50 million, if it takes $8 million, what the Senate recommends, or whatever compromise you can do.

I want to thank you, Senator.

[Prepared statement of Mr. Skye appears in the appendix.]

The **Chairman**. Thank you very much.

Our next witness is Ms. Margaret Roberts, a board member of the Alaska Native Health Board.

Ms. Roberts.

STATEMENT OF MARGARET ROBERTS, BOARD MEMBER, ALASKA NATIVE HEALTH BOARD, ACCOMPANIED BY REID CHAMBERS, ATTORNEY, ALASKA NATIVE HEALTH BOARD; AND GORDON PULLAR, PRESIDENT, KODIAK AREA NATIVE ASSOCIATION

Ms. ROBERTS. Good morning, Mr. Chairman, Senator Evans, members of the committee.

My name is Margaret Roberts, and I am the chairman of the Kodiak Area Native Association, a tribal organization serving the needs of the Alaska Native people from the Kodiak Island group. I am also the president of the Kodiak Tribal Council. We represent the Chinook Tribe for the people who live in Kodiak. I am also a member of the board of the Alaska Native Health Board, a statewide organization established to champion the health care needs of Alaska's native people.

I am testifying today on behalf of the Alaska Native Health Board, as well as on behalf of the Alaska Association of Regional Health Directors and its member tribal organizations.

In Alaska we have a very special interest in the amendments to the Indian Self-Determination Act now pending before this committee. Ever since its passage in 1975 Alaska's 200 tribes and their representative tribal organizations have been leaders in the government-to-government contracting authorized by the act.

For instance, in fiscal year 1987, tribes and tribal organizations in Alaska have contracts with the Indian Health Service totaling some $46,200,000—including IPA budgets—well over one-third the entire Alaska Area IHS budget. BIA 638 contracting comes to about $16.5 million in Alaska, for a total of $62.7 million in 638 contracts in our area.

The Alaska Native Health Board, the Association of Regional Health Directors, and the regional tribal health corporations unanimously support the proposed 1987 Indian Self-Determination Act Amendments. The amendments will substantially improve the 638 contracting process, and we commend the committee for its excellent work on this bill.

Because time is limited, I will not present my entire written statement; instead, I will summarize the statement, focusing on issues of particular concern in Alaska.

First, we very strongly support section 201(a) of the bill, which would give tribal contractors the protection of the Federal Tort Claims Act. For contractors in Alaska this is absolutely crucial.

Under the Indian Self-Determination Act, tribal contractors take over programs previously operated by the Federal Government. At the same time, the act authorizes the Secretary of Health and Human Services to require adequate liability insurance of tribal contractors. However, there is no component in the IHS budget for liability insurance. For this reason, Indian Health Service has never added funds to 638 contracts to cover the costs of malpractice insurance premiums. Instead, such insurance has been paid for out of program funds at the direct expense of those programs. We do not believe that Congress intended for the Indian people to shoulder the burden of liability coverage which had always been covered by the Federal Government under the Federal Tort Claims Act.

Under this system we spend millions of dollars on insurance premiums rather than on health care for Alaska natives.

According to a recent survey undertaken by Indian Health Service Alaska Area office, from 1984 through 1987 malpractice premiums for Alaska's 638 contractors climbed from about $290,000 to over $1,300,000, almost 500 percent—some 448 percent.

In the next fiscal year these premiums are estimated to rise at a minimum an additional 30 percent to over $1.7 million. To make matters even worse, during the same period most coverages have been greatly reduced. Finally, in some areas insurance companies simply will not insure the bulk of the 638 contractor's employees, including Community Health Aides. I don't think the community health aides in bush Alaska, who are on call 24 hours a day, who depend on the telephone lines when they are dealing with life and death situations when they have to call the doctors, don't get as much credit as they are due, and the 638 contractors are responsible for the actions that the community health aides take.

The insurance situation is creating substantial problems for our contractors. The Manaiilag Association is having severe difficulties in negotiating their new contract to operate the Kotzebue service unit, in part precisely because of this insurance question. The Yukon-Kuskokwim Health Corporation may well be unable to contract to operate the inpatient services in the Yukon-Kuskokwim Delta service unit if it is required to purchase liability insurance, not simply because of the enormous cost of the insurance for what would be the largest 638 contract in the nation, but because such insurance may simply not be available.

Other tribal contractors, like the Southeast Alaska Regional Health Corporation, and my own Kodiak Area Native Association, have met this crisis, in part, by setting up their own self-insurance funds.

If this is going to continue—the high cost of the malpractice—I believe our contractors will have to close their doors, literally, because we just won't be able to afford the high cost. We, at this time, at the Kodiak Area Native Association, are taking monies out of our programs to pay for the insurance, and not only that, but we are collecting our third-party payments.

During the last 2 years nearly $2.5 million in funds, which Congress directed to be spent to provide health care to Alaska's Native people, have instead been spent on insurance premiums. During the same period, only three malpractice claims were asserted out of the tens of thousands of patient contacts. The first two were unsuccessful, and the third was just recently filed. In other words, by requiring tribal contractors to purchase liability insurance, millions of Federal health care dollars are diverted to private insurance companies with no identifiable benefit to the Federal Government.

To us the answer is clear: the law must be changed to guarantee Federal Tort Claims Act coverage for 638 contractors and their health care employees. For this reason we wholeheartedly support the bill's proposal to add a new section 102(c)(2) to the act.

We do suggest that the committee clarify one important point when preparing its report on this provision. We are required to purchase liability insurance to cover not only future incidents, but also past incidents that we could still be sued on. This is called Tail Liability coverage, and it is very expensive.

We want to be sure that the bill's Federal Tort Claims provision will cover all incidents that we have to insure for, including those that occurred before the bill was enacted, so that we don't have to maintain the Tail Liability coverage. This problem is explained in more detail in my written testimony previously filed with the committee.

We strongly support many other provisions of this bill.

Section 205 is so valuable because it guarantees, for the first time, that 638 contractors will receive all contract costs, including indirect costs.

There are several problems unique to Alaska that we would like to see addressed in the bill. These are addressed fully in our written testimony, including the section 104(a) grant program, treatment of cost of living allowances, and expenditure of carry-over funds. I will, however, address some at this time.

I am not sure if the committee is aware, with the 104(a) grant program: we have 39 tribes in Alaska who are not on the Federal Register, and they are unable to seek 104(a) grant funds.

Also, the Intergovernmental Personnel Act, known as the IPA: when a tribe assumes control of a program under a 638 contract, it has the option of retaining current Federal employees in the program under the Intergovernmental Personnel Act. The use of the IPA process by tribal contractors makes the transition from IHS administration to tribal contractor administration much easier. It also preserves important Federal benefits. However, as administered by IHS, IPA assignments also create problems in the 638 process.

First, if the particular employee covered by the IPA agreement resigns or is terminated IHS will generally not let us hire a replacement Federal employee under the IPA Memorandum of Agreement covering that employee, even if another Federal employee is willing and available or could be recruited. Instead, we must seek to hire a replacement on the open market. This both severely restricts the pool of available, qualified applicants, and means that we cannot attract applicants with the added benefits of Federal employment.

A second problem is that IHS views certain IPA agreements as possible only if the employee goes on leave-without-pay status. But if the employee does so, he or she does not receive any credit towards Federal retirement under the period of the leave. This, too, undermines the IPA process.

Third, IHS will not permit tribal contractors to move IPA employees to different jobs or GS levels. This means we cannot promote employees or grant transfers deemed necessary by the tribal contractor. The lack of career development and job advancement means that as time goes on we lose many experienced IPA employees. It also severely limits the tribal contractor's ability to fully exercise self-determination in the management and restructuring of the programs to better meet the needs of our people.

Lastly, as a rule IHS does not include the IPA budget in the 638 contractors contract document. This means that when an IPA employee later leaves his or her position, IHS sometimes refuses to give us the funds to hire a replacement. This is plainly unfair and illegal, because when a tribal contractor agrees to take over a program, the contractor expects that the staffing of that program is fixed in the contract through the IPA agreements. Then, when vacancies occur, the contractor finds out that the Indian Health Service will not provide funds to fill the vacancies.

Although the problems associated with application of the Intergovernmental Personnel Act may seem technical, they are vitally important to the success of 638 contracting. The 638 contracting of major health programs cannot succeed without substantial use of the IPA process.

We urge the committee to consider adding a new section to the bill to address our concerns in this area.

Also I'd like to mention another problem that we have in Alaska. Tribal contractors and the Alaska Native Medical Center, an IHS-run facility, are in direct competition with each other for scarce funding. As IHS holds the purse strings, it is in the direct conflict of interest position.

Mr. Chairman, in light of your time constraints that concludes my oral testimony for today. This is the first time I have ever testified in anything like this before, and I also failed to introduce that on my left is Mr. Gordon Pullar from the Kodiak Area Native Association—he's the president; and to his left is Mr. Reid Chambers from the Sonosky, Chambers, Sachse, and Miller's law firm.

[Prepared statement of Ms. Roberts appears in the appendix.]

The CHAIRMAN. Ms. Roberts, this may be your first time, but I hope there will be many others. May I just tell you that you have done a very expert job, and we have been better enlightened as a result of your testimony.

Ms. ROBERTS. Thank you.

The CHAIRMAN. We will take your words to heart and do something about it.

Our next witness is the vice president of the Inter-Tribal Council of Arizona, the Honorable Anthony Drennan.

STATEMENT OF HON. ANTHONY DRENNAN, VICE PRESIDENT, INTER-TRIBAL COUNCIL OF ARIZONA

Mr. DRENNAN. Thank you, Senator Inouye and Senator Evans and your staff.

Before I get into my testimony, Senator, very seldom do I come out to the Southeast. They tell me it is hot in Arizona at 100 degrees, but 86 here, with its humidity, let me tell you I was sweating.

Mr. Chairman, on behalf of the Inter-Tribal Council I appreciate the opportunity to present testimony on the proposed amendments to Public Law 93-638 offered by the Senate Select Committee on Indian Affairs. Like my friend here, I didn't get into the record my name: Anthony Drennan, Chairman of the Colorado River Indian Tribes, and also the vice president of the Inter-Tribal Council of Arizona.

Mr. Chairman, paraphrasing just a little bit on your opening remarks this morning, the Indian Self-Determination and Education Assistant Act—Public Law 93-638, as amended—is a forceful and clear statement of policy by the Congress that calls for maximum Indian participation in the government and education of the Indian people, for the full participation of Indian governments in Indian programs and services conducted by the Federal Government, and the development of human resources of the Indian people.

The Senate Select Committee on Indian Affairs took the time to hold oversight hearings on Public Law 93-638 earlier this year and has made an effort to solicit tribal consultation through a series of meetings with appropriate tribal representatives. This process provided the Senate Select Committee staff the necessary information to draft appropriate amendments to the Act. The committee's efforts to identify and clarify the issues in order to draft the necessary amendments is highly commendable. Also, Senator Evans, we appreciate all your efforts in that.

The Inter-Tribal Council of Arizona has worked with Indian governments over the past three years to identify concerns with Public Law 93-638 grants, funding, and Federal-tribal coordination. The Committee on Indian Affairs has responded positively—I would like to say beautifully-- to many of the concerns identified by Indian leaders, including: the need for the Bureau of Indian Affairs and the Indian Health Service to fully fund tribal indirect costs for Public Law 93-638 contracts; the need for year-to-year stability of funding levels in order to improve planning and management of programs; clarifying that Federal procurement laws and acquisition regulations should not apply to Indian self-determination contracts; reducing the paperwork and reporting requirements, particularly for mature contracts; allowing for consolidation of mature contracts, and multi-year contracts; alleviating problems associated with over-recovery and under-recovery of indirect costs from Federal agencies other than the BIA and Indian Health Service; and improving avenues for contract appeals and conflict resolution.

The Indian Self-Determination Act does not only involve contracting. Indian self-determination also includes a cooperative working relationship between Federal agencies and Indian governments. The Phoenix Area for the Bureau of Indian Affairs and the Indian Health Service covers 3 states, 10 BIA agencies, 10 Indian Health Service units, and 42 tribal governments. The BIA has some 280 contracts with tribes in Arizona, Nevada, and Utah. The current 60-day timeframe for approving contracts and resolving application differences creates a crisis-oriented, adversarial relationship that has resulted in delays for contract approvals. The Inter-Tribal Council of Arizona recommends that the Senate Select Committee on Indian Affairs include language in the amendments to Public Law 93-638 that would: one, provide for a 1-year time period for tribes and Federal agencies to plan for, negotiate, and enter into new contracts. This longer time period is especially important to enable the Bureau of Indian Affairs and Indian Health Service to relocate Federal personnel, and to plan the budget requests for indirect costs.

Two, require BIA and Indian Health Service area directors to annually report to tribes on the programs operated by their respective area offices, including workload statements, FTE's, planned budgets, and actual expenditures.

This morning, Mr. Chairman, you've heard many of the speakers talk about the need for the 100-percent funding of indirect costs. We, too, in Arizona want to especially point out that the need for appropriate funding in the indirect cost area is in order, and to carry out the 638 contract functions of the Federal agencies it is necessary at the minimum that $50 million be appropriated. Anything less, we believe, hinders the tribal government's efforts in this area.

So, again, we appreciate the time presented for the Inter-Tribal Council and myself to present testimony this morning. Thank you.

[Prepared statement of Mr. Drennan appears in the appendix.]

The CHAIRMAN. Thank you very much, Governor.

I am certain that all of you realize that even if every provision in this measure is adopted by the Congress and signed into law, it will not cure all of your problems, because this is just one of the many steps that we will have to take.

For example, there is a problem that you may be able to assist us in: how do we change the structure of the BIA or the Interior Department? Most agencies and departments of the Federal Government have contract specialists, men and women who know the specific areas that they are dealing in. They also have a separate Inspector General office, and that IG office does the auditing. They have a contracting office to do the contracting, and the Inspector General office to do the auditing.

In the case of the Interior Department the same person—the Inspector General—negotiates the contracts, and there are no specialists or experts there, and the same agency IG does the auditing. Obviously there is a conflict of interest, and we would like to change that situation. This is just one example of many structural problems we have involved in the BIA and the Department of Interior.

So if you do have any suggestions that you would like to offer us, our door is open. We would be very happy to hear from you.

Senator Evans.

Senator EVANS. Thank you, Mr. Chairman.

I certainly endorse what you have just said. We can write all of the regulations and the details into all the acts in the world, and unless that is based on a serious attempt by the agencies who are charged with carrying out the acts to develop some new relationships and new understandings, all that we write will be of little value, really.

First, Joe DeLaCruz, that's an interesting proposal that rather than having your budgeting based on administration requests, especially as we go through the year and it becomes more and more obvious that administration requests are going to be superseded by Congressional appropriations, you suggested, instead, that the alternative might be to base the early negotiations on last year's levels rather than the Presidential budget. Could you tell us what the timeframe is for all of this? When do you first begin to talk with the Bureau of Indian Affairs on new budgetary proposals—what time of the year? How long do they continue to insist that the administration request is going to be the level that you've got to keep working on?

Mr. DeLaCruz. Senator Evans, we start our process in recontracting in April, and we're dealing at that point with the President's budget. It has only been in the last couple of years with the present administration that they have been holding it down to the line to the President's budget, this is all that is allocated out to the area, or down to this particular agency.

I come from a multi-agency with several small tribes. In the past, a few years back, the bureau itself was treating us as an extension of the U.S. Government under a continuing resolution. It is only through some of the manipulations that began happening that the committee and Congress have stopped with the various slimmer initiatives on 15 percent and holding various moneys back that we are caught in this situation now right down to the final day of contracting on the President's budget.

What we have now is that we are faced with a situation of tribes signing contracts starting October 1 with 15 percent indirect costs, or they are being asked to sign contracts for only 9 months' funding, or reduced budgets.

I have an instance I am very familiar with on forestry from the program we've been operating on management regeneration for the past several years. I signed a contract just to keep staff on for $163,000—a program that the previous year was some $900,000. I have to plan now, whatever happens to the process, to lay off all my forestry staff by Christmas. I filed a declination this year with the Department of Interior that I am retroceding all contracts, again under the regulations of the U.S. Government. The letter I got back said that they could not provide the services that we were providing come October 1. So I don't know where we are.

Senator Evans. So you're in a position where they won't let you budget, or they are budgeting at such a low level that you can't provide the services, and you're saying that you can't provide the service and you're retroceding back——

Mr. DeLaCruz. Retroceding back to you, and they're refusing——

Senator Evans. They're saying, "Well, fine, we can't provide the services either."

Mr. DeLaCruz. Right. I feel that we are on some type of continued resolution. Of course, there is not even a continued resolution. At least if we're dealing with the previous year's funding as we negotiate, whatever falls out through the appropriations, then, there could be that adjustment to contracts which they say doesn't hold true to the law—has always been funding available anyway.

But for budget planning, if we could at least be dealing with the previous year's experiences we'd be in better shape.

Senator Evans. But now, at this point, the House has already passed an appropriate bill. The House-passed appropriation bill, as I understand it, is significantly higher than the administration's request, and presumably was given enough money for you to come back with at least some reasonable or rational budget level for this particular program; is that generally correct?

Mr. DeLaCruz. That's correct, Senator.

Senator Evans. But they are still, in spite of the fact that the House has passed an appropriation act. In past years how long have they insisted on following that Presidential budget even after the point when—the trouble is that the Senate doesn't seem——

Mr. DELACRUZ. This is the first year they've been so stringent on it, Senator. This is the first year the Bureau has been so stringent on it, but it gets back, I think, to some of the other initiatives that Undersecretary Swimmer was pushing on 15 percent flat rate, and the other things that Congress stopped. They've been adamant that we're going to go into a nine month contract or reduced funding contract, otherwise the contracting officer is not going to sign the contract.

Senator EVANS. So the $163,000 that you're talking about is really just a short-time——

Mr. DELACRUZ. That's what they're saying was in the President's request because they knocked that budget out last week that was in for forestry management at Kowalt. But that's what they're saying there is to contract. So I retroceded, but they said they can't provide the services, we weren't either, so I don't know—I guess we're back in court again. We are in court with them all of the time.

Senator EVANS. Just to carry that forward one step further. In the particular program you are talking about, the Timber Management and Regeneration Program carries with it, as I understand, the kind of policies and activities that have to be conducted on a regularized basis year to year if you are going to have any consistency in future years in terms of timber harvest or timber growth. So you can't just go up and down and skip a year or anything without having some long-term significant consequences that eventually are going to be harmful in terms of your own revenues that come from timber sales; is that correct?

Mr. DELACRUZ. That's true, Senator.

Senator EVANS. So even this process that they're going through doesn't just have this problems for you this year, but really, if carried fully through, would have awful consequences both for your revenues and for the independence, generally, of Indian tribes in this field?

Mr. DELACRUZ. As I see it—and I'm talking about a lot of the tribes in the Northwest. I'm contracting forestry and fisheries, and some health programs, human services. I look at my contracts across the board at what both IHS and the Bureau of Indian Affairs is telling me that I have to go into 9-month contracts or reduced funding contracts.

IHS hasn't made up their mind yet under what formula they are going to fund indirect on their contracts, but they sent me some options that we threw out eight months ago that they agreed on that we look more at the process that our task force developed for the Northwest Health Board and affiliated the blue book that we gave copies to the committee. They look at that process. But as of last week they sent a letter for tribal comment on some formula to distribute 60 percent funding.

I'm in a retrocession situation laying off staff. I just can't see how my tribe can pick up any more from our hard dollars and liquidate tribal resources to contract carrying out service to the U.S. Government.

Senator EVANS. Just one further question, then, on this whole timber management. Isn't it also true that when they tell you if you retrocede and they can't provide the service that timber, specifically, is a trust responsibility?

Mr. DELACRUZ. That's right.

Senator EVANS. Do you have any qualms at all about the fact that if you had to go to court you would win?

Mr. DELACRUZ. I think we will. Of course, we've got the Mitchell case now for the historical problem that was created on Kowalt by lack of reforestation. In fact, I feel so strongly that we'd win with some of the developments in the Pacific Northwest with our fisheries, timber, fish, and wildlife, of the management perspective of industry the tribes and the States now that you've got three years to reforest or get lined back in reproduction. Somebody is going to be in some big trouble on this.

Senator EVANS. You mentioned that. For everyone's benefit, it seems to me one of the most striking and spectacular things that has happened during this last generation is the change in attitude and responsibility as it relates to the private sector—the business sector, now—as the fisheries managers, both at the State level and privately, and the timber managers at the State level and privately, and the tribes are all beginning to work together in a cooperative venture. Somehow it would be nice if that disease infected the Bureau, because I think that the other things that you are doing in this kind of cooperative venture—and really very, very successfully—and if you had the opportunity to manage as you wish on the reservation it would help that.

Mr. DELACRUZ. I might point out, Senator, that we have an agreement with IHS to develop a joint-owned information system. That's with IHS. When we get to budget questions or policy questions a lot of times—I call them "faceless people" sitting up IRSA and make these decisions that we keep blaming Indian Health for, but the structure of IHS, from the secretary down, and Health and Human Services, et cetera, it is hard to deal with where you put your finger on where policy is coming out there.

On IHS funding problems we sat down with Doctor Rhoades, with the people from IRSA, and people from the undersecretary's office several months ago in Tulsa, and they agreed that they were not going to come out with trying to make us accept contracts with 60 percent funding as far as indirect costs or contract administration. Now in every option I look at that is what they are trying to do again.

The other thing they agreed on—which they're trying to do again—is privatization, not in the 1988 budget but in the 1989 budget I see where they are adding $13 million or $11 million to dangle in front of tribes and health contractors to look for alternative resources. I'll tell the Senate that we are using and exhausting every alternative resource there is out there to cover health needs for our people, and we are not able to because of a lack of appropriations.

Senator EVANS. One other question: you mentioned tribal participation in budgeting, which now calls, as I understand it, for consultation, but consultation is a quick and irregular type of thing. Do you have any specific proposals as to how best we can ensure adequate tribal participation in the budgeting process?

Mr. DeLaCruz. I definitely do, but I've been—you know, going back through the years the Bureau had its ZZB, and they called it "raised titles." When they came out to meet with the tribes they've got their budget that covers all their personnel, every level of their government. Most of the things that tribes are struggling for now today are things in the fisheries, forestry, and health are things tribes had to go around over and above what the administration—regardless of what administration was requesting. We got those dollars added through initiatives of our regional organizations and those type of things. We start out with either budget that becomes the President's budget, basically, of what the needs are of the bureaucracy—that's at the level of the service unit or the agency, in the case of the Bureau.

You've got their budget based on what their previous year's experiences were, previous year's tribal budgets. I just believe that I don't know how we do it, but through our tribes, our regional organizations, since we can't seem to really develop a process of partnership with the administrative branch of the U.S. Government that somehow we have to with the various appropriations committees, and that's where we've either had to get dollars to survive or stop what was happening. I don't know if you can legislate administratively how that relationship is with those agencies as they develop their budgets, but it is so frustrating when you go through their process and every level starts at their agency, their area, the central office, then the secretaries and undersecretaries—everybody makes changes. Nobody knows what that budget was that they submitted at the bottom level by the time it hits the Hill. You don't know where you're at, and you sit there wondering what to do.

Senator Evans. You have an interesting proposal in your written statement that, in essence, would see any deviations in recurring base program funding allocations must first obtaining approval with the appropriate Congressional committees—that would be a very interesting way to do it. I'm not sure that we have the staffs—at least not yet—to do that effectively, but it would certainly change some relationships. We'll have to puzzle through that one I think, Mr. Chairman, and try and figure out if that or an alternative of that is going to be necessary in order to get adequate—maybe we need to change the word "consultation" or define it better in terms of just what that means, and that it is not just a casual or one-sided type of thing, but a true partnership in building these budgets.

Mr. Skye, did you say that where the programs are less than $100,000 there is no cost recovery? They don't allow that? Or is it their policy?

Mr. Skye. Well, what they are doing is making the tribes take the indirect costs out of the money that they contract for. In other words, they used to provide contract support, or there used to be a line item for indirect costs, but they cut that out, so now they take the indirect costs right out of the contract.

Senator Evans. But in building a contract, and the size of contract, how much can you put in there specifically—not just as a percentage of indirect cost recovery, but put in there as part of the contract the supervision or management at the tribal level, or whatever other things that normally would be part of what we would consider indirect costs? Would they approve those, or would they knock all those out?

Mr. SKYE. Well, in the Bureau of Indian Affairs my experience is that you take what they give you because that's all they have, and they tell you that they don't have any more.

Senator EVANS. So it doesn't make much difference how you count it, there are only so many dollars?

Mr. SKYE. Senator, I have a resolution from the Cheyenne River Sioux Tribe that was passed, and they are requesting that the Cheyenne River Sioux Tribal Council is hereby recommending that the National Congress of American Indians advise Indian tribes to consider retroceding their Public Law 93-638 contracts with BIA and IHS until such time that the tribes are provided with adequate staff, funding, and contract dollars to administer those programs. I'd like to introduce this resolution for the record, if I may.

The CHAIRMAN. Without objection it will be received and made part of the record.

[Cheyenne River Sioux Tribe resolution appears in the appendix.]

Senator EVANS. Do you have any estimate of what would happen if all tribes in the United States were to immediately retrocede all of the programs that they are now taking on?

Mr. SKYE. I don't have any idea.

Senator EVANS. I don't think the BIA does, either.

The CHAIRMAN. Maybe we should try that. [Applause.]

Senator EVANS. That would be a pretty powerful message.

Mr. SKYE. Right.

Senator, I have one more suggestion. You know we have had such devastating experience with the Indian Self-Determination Education Assistance Act, which in some ways has been good to us, and in other ways has been real difficult. In your bill you address multi-contracting. I would like to suggest that you have some words in there that provide for master contract. In other words, a tribe that has 50 different contracts with the Bureau of Indian Affairs would be placed into one master contract, and then there is given the indirect costs for the total amount. That may hurt them, but they would at least know the amount of dollars that they were going to get.

The other way is that, you know, they've got 50 different contracts, and they are collecting indirect costs off of those different small or large contracts, and then they are reduced and have to operate, as Mr. DeLaCruz stated, at a 75-percent level which is, again, devastating for central administration. So in that way I would see a better process take place in collecting our indirect costs.

Senator EVANS. We do attempt to allow that to happen in the amendments and in the proposal that we have, and if people will look at that section very carefully and tell us whether it is adequate or whether we need to modify it or change it or broaden it any way, that would be very helpful.

I guess, Mr. Chairman, that we will keep the record open for some length of time for additional testimony if that's desirable.

Ms. Roberts, what is the rationale for IHS refusal to replace personnel under the IPA? What do they tell you? Or do they tell you anything?

Ms. **Roberts**. I'm afraid I can't answer that.

Senator **Evans**. Well, fine. If you——

Ms. **Roberts**. They require it to be on the open market.

Senator **Evans**. I see. So they require it to be on the open market, but the open market doesn't include the possibility that personnel under IPA would be the best alternative? Even after you look at the open market situation, and can't find anybody, will they then still refuse? I'd be delighted to have your colleagues participate.

Mr. **Chambers**. Senator, as I understand——

Senator **Evans**. Please identify yourself for the record.

Mr. **Chambers**. I'm sorry. My name is Reid Chambers, and I'm the attorney for the Alaska Native Health Board.

Senator Evans, as I understand the problem, it comes about this way: a Federal employee is assigned to a tribal organization under the IPA, then, for one reason or another, that employee leaves. He or she may leave because he can't be promoted, or because they're not getting the cost of living allowance that is non-taxable for people in Alaska and Hawaii, they don't get that, and it is a particular Alaska problem here. But for one reason or another the person leaves, and there is a qualified Federal employee that could replace him, but it is a different grade or something like that—they're not cooperative in making that assignment.

Instead they require the contractor to go on the open market, and it takes time and it takes delay, and it would just be much more simple to plug in another qualified Federal employee, and they can't do that because also the contracting budget usually doesn't include the IPA assignment—the salary and cost of the IPA official. So the money also tends to get yanked back when that individual leaves and they can't use it readily for another person.

Senator **Evans**. Do you find that that same amount of money that might be available on the open market is insufficient to find anybody in the open market, especially for some remote rural areas?

Mr. **Chambers**. Well, it sure can be, Senator, yes. Do you mean to get someone who is not a Federal employee and not with Federal benefits?

Senator **Evans**. Yes; they say you go out in the open market, and then there is insufficient funds in the contract to really hire the kind of person on the open market that you would like to have.

Mr. **Chambers**. Yes, sir; that's precisely the problem. It may be a worse problem—it seems to be a worse problem in Alaska. I don't know—we haven't heard a lot of testimony on that in the lower 48.

Senator **Evans**. Mr. Drennan, you suggested making the time period for negotiations to go from 60 days up to one year. Is it your finding that the 60-day period is too short to do an adequate kind of review job and negotiating job?

Mr. **Drennan**. Senator Evans, this is true in the Phoenix area, and probably in other areas where maybe due to shortage of staff within the agency or the area office there is a lot of time delay.

Last year I don't know what the big problem was, but we didn't get our contracts renewed until 2 or 3 months afterwards.

Senator EVANS. Even though there was a 60-day period where they were supposed to be?

Mr. DRENNAN. Yes; and so it is really hard to know what is going to happen when you have a program that you are running in behalf of the BIA agency or the Indian Health Service. So we find that by maybe lengthening this period and getting proper planning and so forth maybe we can alleviate some of this.

Senator EVANS. You're not worried that if the length of time is extended—probably all or maybe some of the simpler programs wouldn't take a full year to negotiate, but would be more straightforward and could be negotiated in several months. Is there a danger that, you know, once a year is the deadline; everything takes a year? Or is that okay as long as you know that there is sufficient advance time to plan for these things?

Mr. DRENNAN. Well, with these multi-year contracts I think it is a little better, but yet we still have to negotiate the dollar amount and so forth. We still feel that it may be better to have a little more time to do this.

Senator EVANS. Adding a length of time would help?

Mr. DRENNAN. Yes.

Senator EVANS. OK. Thank you.

Mr. DRENNAN. One of the other areas that we find—and I'm quite sure this has been alluded to—but in a layman's terms the cost reimbursement is not coming forth as soon as we would like it to. For some of us small tribes that don't have limited funds, even in trust, to carry those things over, the loss of funds from the interest, which we use—my tribe, anyway—we use as part of our tribal budget, we lose thousands of dollars every year because of that. So maybe we need to talk about that.

Senator EVANS. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Because of the importance of this bill—and let me assure you that this measure is very important. We rank this with the top priority matters, such as Indian health, Indian financing, and such. The record will be kept open until October 16. Keep in mind that our mark-up is the 21st, so the 16th is the absolute deadline because the members of the committee and the staff would need adequate time to study your recommendations before we get into the mark-up of the measure.

One would think that after 10 years of experience in indirect costs that we would have had some solution; but apparently very little has been done. That is why we consider this measure to be so important.

As the alternative suggested by the Bureau of Indian Affairs, to wit, the 15 percent cost alternative, that alternate is so obviously impractical and so obviously unfair that one would think, "Why did the agency decide to submit this alternative?" For example, it is so unrealistic, in the case of Ms. Roberts, the Government of the United States does not have to carry and pay for malpractice insurance, and that's a major cost item to all of the tribes in the United States.

The Government of the United States has many other agencies that they can call upon for assistance. You people don't have that privilege and that authority.

The Government of the United States gets involved in bulk purchasing. Your small tribes can't afford to, and none of the distributors would give you the benefits of bulk purchasing when you just purchase a few items.

So it is obviously unfair and obviously impractical, which would lead one to conclude that maybe this was set up just to demonstrate that Indians can't carry out the business and are inept. Well, we're going to change that. [Applause.]

So may I once again strongly suggest to you to get your recommendations in, or any additional statements, by October 16. We will study them very carefully, and if we feel that it is in the best interest, we will put them in the bill.

A final word about contracts: I am a member of the Appropriations Committee, and there we deal with contracts all the time. Whenever the Department of Defense gets into a contract with General Electric or Boeing or any one of the other great organizations, that contract is carried out, even if it means supplemental appropriations. But strangely in this trust relationship with Indians they come to you maybe halfway or three quarters through the fiscal year and say, "Sorry, boys, we don't have the cash, so we're going to stop right here" after you've put up all the money. At the same time, you don't have the resources to sue the Government. Obviously, the equity is not on your side. We're going to change that also. [Applause.]

I'd like to thank all of you for participating this morning.

[Letter from Omaha Tribe of Nebraska appears in the appendix.]

The CHAIRMAN. We will now stand in recess and join all of you at the general assembly session of the National Congress of American Indians.

[Whereupon, at 11:25 a.m. the hearing was adjourned.]

APPENDIX

PREPARED STATEMENT OF LIONEL JOHN

Mr. Chairman, Committee Members and Staff, good morning. I am Lionel John, Executive Director of the United South and Eastern Tribes (USET) and a member of the Seneca Nation of New York. USET, headquartered in Nashville, Tennessee is an inter-tribal organization composed of 16 member tribes located in nine states along the east and southern gulf coast from Maine to Louisiana.

First of all, we would like to express our appreciation for having the opportunity to express our views on the Committee's proposed amendments to the Indian Self-Determination Act. We would also like to express our appreciation and commend the Committee and its staff for working diligently and in close consultation with the Indian tribes and organizations in developing the proposed amendments.

Since our comments and recommendations go to provisions of both the existing law and the proposed amendments, our Section, page and line references are to the August 7, 1987 Committee document which combines "Existing Law and Proposed Amendments" rather than the August 7, 1987 draft bill of amendments.

Reference and Recommendation #1

Section 8 of the existing law provides that fiscal year funding provided under the Snyder Act which are not obligated or expended by the end of a fiscal year be carried over and expended in the next fiscal year.

We recommend that Section 8 be amendment by -

(1) on line 11 after the word "obligated" strike the word "and" and insert the word "or",

(2) on line 13, after the word "obligation" strike the word "and" and insert the word "or",

(3) Following line 14, add the following new language:

"If the funds are to be expended in the succeeding fiscal year under a contract or grant for the purpose for which they were originally contracted or granted, no additional justification or documentation of such purposes need be provided by the tribal organization to the agency as a condition of receiving and expending such funds."

Justification

We feel that if such carry over funds are to be expended under a contract or grant with no material changes from the original purpose, that the tribal organization should not have to redocument and rejustify expenditure of the carryover funds.

Reference & Recommendation #2

The Committee's proposed amendments would add a new paragraph (2)(A) to Section 102(C). This new provision would extend Federal Tort Claims coverage to tribal organizations and Indian contractors for medical negligence occurring within the scope of health and dental services provided under a self-determination or "Buy Indian" contract with the Indian Health Service.

USET strongly endorses and supports this provision. Since tribes are contracting to provide essentially federal health care services, they should be covered under the provisions of the Federal Tort Claims Act.

It has come to our attention that the Justice Department will reluctantly accept extension of Federal Tort Claims coverage to tribal organizations contracting pursuant to the Indian Self-Determination Act but that they adamantly oppose coverage of any entity who contracts to provide health care pursuant to the Buy Indian Act (25USC§47).

There are some tribes including one of our member tribes, the Eastern Band of Cherokee, who prefer to utilize the contracting authority of the Buy Indian Act rather than the Indian Self-Determination Act in administering and operating hospitals and clinics. Additionally, virtually every urban Indian health clinic is contracted via the Buy Indian Act. Indian contractors of these urban Indian clinics are not tribal organizations within the meaning the of the Indian Self-Determination Act and are thus ineligible to contract under that Act.

If Justice advocates their position and this Committee and Congress were to adopt their recommendations, it would result in some tribes being covered under the Federal Tort Claims Act and others not. And none of the urban Indian clinics would be covered.

There are no material differences in the types or quality of health care provided under an Indian Self-Determination Act contract versus a Buy Indian Act contract. Both contracting authorities authorize the provision of federal health services to be transferred from the Indian Health Service to tribal organizations or Indian contractors.

While the Indian Health Service is presumably responsible for covering the costs of contractors obtaining private malpractice insurance, rapidly escalating insurance premiums and inadequate federal funding have resulted in many tribes and Indian contractors operating in heavy deficits and considering retrocession of their contracts back to the Indian Health Service or going bankrupt.

Justice is supposedly concerned that many urban Indian clinics, (out of economic necessity) provide health care on a fee for service basis to persons who are non-Indian. They do not wish the Federal Tort Claims coverage to extend to services provided by an urban Indian clinic to non-Indians. Justice also seems to be concerned that an Indian physician in private practice might claim coverage under the Federal Tort Claims Act when providing health care to an Indian pursuant to contract care agreements IHS has with various private hospitals and clinics.

We would recommend that paragraph (2)(A) of Section 102(c) not be amended to delete coverage of Tribal or urban Indian contractors contracting under authority of the Buy Indian Act.

Rather, we would recommend that paragraph (2)(A) be modified to ensure that Federal Tort Claims Act coverage extend only to the provision of health care authorized pursuant to the contract and only when such services are provided to a person who would have been eligible for such services if they were provided directly by the Indian Health Service.

We further recommend that sub-paragraph (2)(B) be stricken.

Justification

To delete coverage of Tribal organizations who prefer to contract under they Buy Indian Act or urban Indian clinics who can only use that authority would result in an unnecessary exclusion of Federal Tort coverage and increased costs to such contractors. Regardless of the contracting authority used, both contracting mechanisms result, as intended, in a transfer of administration and delivery of Federal health care services for the Indian Health Service to Indian people at the local level.

Since the major impact of exluding Buy Indian contracts would be on urban Indian clinics, many would become insolvent or retrocede their contracts. IHS could not operate such clinics economically resulting in closures. Since OMB has proposed defunding urban Indian clinics the past several years, perhaps this is a back door method of achieving their goal.

Subparagraph(B) should be stricken. IHS health care services are not currently limited to Indians only. Non-Indian spouses may receive services and IHS also provides emergency services to non-Indians if no other care is available. Urban Indian clinics should be covered when providing health care that IHS would provide if they were directly providing the service.

Reference and Recommendation #3

Since the contracting authority under the proposed amendments would be consolidated in a revised Section 102, the reference to section 103 in the new section 103(b)(2) on page 18, line 1 should be changed to read section 102 and not section 103.

Justification

This is a technical amendment to comport with proposed new section numbers.

Reference and Recommendation #4

Section 102(a)(2) states that the Secretary shall have only "ninety days" to review and approve of a self-determination contract after receipt. We recommend that this be changed to 180 days. (See page 12, lines 3-8).

Justification

A longer time period is important to enable agencies to relocate federal personnel and to plan for budgeting requests for indirect costs.

Reference and Recommendation #5

The proposed new subsection (d) of Section 103, page 18 beginning on line 7, directs the Secretary to provide technical assistance to tribes to develop their capacity to contract and assume administration of federal programs.

We recommend that this subsection be clarified to ensure that a tribe has the option to obtain their own outside technical assistance.

Justification

It has been our member Tribes experience that often the agency does not have sufficient in-house expertise or sufficient time or personnel to provide the necessary technical assistance to tribes. Often better technical assistance is available and on a more timely basis from outside sources.

Tribes should not be forced to rely upon agency technical assistance if that assistance is non-existent, inadequate or untimely.

Reference and Recommendation #6

Newly proposed subsection (c) of Section 105 (as renumbered), page 26 provides that multi-year self-determination contract amounts may be "...negotiated annually to reflect factors, including but not limited to cost increases beyond the control on an Indian tribe or tribal organization." (See page 26, lines 23-26). Technically speaking, cost of living, pay increases and promotions are within the control of a tribe or tribal organization.

We recommend that this provision be clarified so that it not be construed to prevent reasonable cost of living, pay increases and promotions.

Justification

Federal employees receive regular cost of living adjustments, step pay increases and, where merited, promotions.

Tribal employees paid under federal contracts, however, often go for years without any or very little adjustments in their starting salary. Often our most experienced people resign because of static pay year after year. Cost renegotiations must take into account the necessity to adequately compensate employees.

Reference and Recommendation #7

The proposed amendments overall attempt to distinguish self-determination contracts from general federal procurment contracts. Section 105 (as renumbered) page 25 would make the Federal Procurment Policy Act and implementing regulations inapplicable.

Presumably, based upon the overall changes being proposed, both Interior and HHS will need to develop implementing regulations.

Section 107 of the existing Act sets out consultation procedures and deadlines for development of implementing regulations to the original Act.

We recommend that Section 107 be amended to provide for updated consultation and deadlines in the development of implementing regulations by the agencies.

Justification

The proposed amendments to this Act were developed in close consultation with and after years of actual experience by Indian tribes. Most tribes felt that the original Act was subverted through restrictive regulation. Based upon years of actual experience, Tribes are in a better position to ensure viable regulation development.

Reference and Recommendation #8

Throughout the Act reference is made to the Secretary of Health, Education and Welfare. Technical amendments should be made to reflect the current name of the agency as follows:

Page:	Lines:
17	14
28	26
33	17 & 23
34	4, 9, 14, 18

Likewise, references to the Senate Interior and Insular Affairs Committee should be changed to Senate Select Committee on Indian Affairs.

Page:	Lines:
34	6, 23

Conclusion

USET strongly endorses the proposed amendments and we are especially supportive of the newly proposed Section 106. We feel these amendments are long overdue and that they will go a long way in ensuring that self-determination can finally be effectively carried out.

We thank you for your close consultation, reasoned approach and attention to this very serious and complex issue.

We urge expeditious passage of this measure with the recommended changes reflected in our testimony.

Thank you for this opportunity to express our views.

Northwest Indian Fisheries Commission

6730 Martin Way E., Olympia, WA 98506 Phone (206) 438-1180

Testimony To The
U.S. Senate Select Committee
On Indian Affairs

Tampa Bay, Florida
September 21, 1987

By Bill Frank, Jr., Chairman,
Northwest Indian Fisheries Commission

Senator Inouye and members of the Select Committee, I am Bill Frank, Jr., chairman of the Northwest Indian Fisheries Commission. My comments to you today represent the fisheries-related interests and concerns of the Treaty Indian Tribes of the Pacific Northwest. My message is simply this- the Treaty Indian Tribes are acknowledged governments and we hope and expect to be treated as such.

It is the stated policy of the United States Administration and Congress that they endorse the goals of self determination by the tribes and that they will work with the tribes on a government-to-government basis to assist us in becoming self-sufficient. Yet it is the apparent policy of the Bureau of Indian Affairs to undermine the ability of the tribes to pursue these goals.

We feel that a government must be able to develop a sound economy. Yet that is virtually impossible when the tribes are forced to subsidize federal programs. You have made clear your intent to have the tribes recover full costs of operating federal programs, but the BIA is searching high and low for ways to avoid paying them. The FY 1988 budget requests of the BIA, and the Indian Health Service, were each $10 million short. At the present time, the BIA funding level would cover less than 70 percent of indirect costs. If the tribes are to function effectively, funding for their federal trust programs must be protected, including 100 percent recovery of indirect costs.

We wholeheartedly support your proposed Indian Self-Determination Act Amendments. As we understand them these amendments would basically make these changes: 1. Streamline the contracting process by making P.L.93-638 contracts intergovernmental agreements exempt from procurement regulations; 2.Allow mature contracts to be made for up to five years; 3. Permit the consolidation of mature contracts into one contract with quarterly financial reports for advanced quarterly payments with only one final report and audit report, and 4. Protect the funding base of contracts from Secretarial discretionary reduction or reduction to fund federal functions.

It is our understanding that the amendments would protect negotiated indirect costs and require federal agencies to report the status of indirect cost levels to Congress each year. Tribes would also be held harmless from the over/under recovery issue when contracting with federal agencies and would not be asked to pay these theoretical costs from previous years. Tribes could contract for all programs and activities throughout the Departments of Interior and Health and Human Services. The civil service benefits of federal employees who transfer to tribal employment would be protected. The Secretary of Interior could transfer ownership of any property purchased by the tribe under 638 contracts and could transfer title of any excess or surplus property.

We are very encouraged that these amendments are supportive of stable tribal governments and that they would provide the basis for improved federal-tribal working relationships. We also believe that the amendments reflect the true intent of the United States Constitution.

We ask you to be fully aware that the BIA effort to tie contract allocations to the President's proposed budget is a severe hindrance to many ongoing tribal programs at a crucial time. We encourage language to assure that tentative allocations for contracts for any one year be based on the previous year's appropriations. Contracts developed in this manner would be awarded pending funds available and then be renegotiated after final appropriations are received. The FY 1988 program is an example of what can happen when there is a bureaucratic decision to tamper with base dollars. Many fisheries contracts have been proposed with reduced scopes of work pending full appropriations. Clearly, this is an unworkable practice. The BIA cannot be allowed to tie contract allocations to the President't budget submissions.

We encourage your expedient favorable action on these amendments.

PREPARED STATEMENT OF GOVERNOR STANLEY PAYTIAMO

Summary - Review of proposed amendments to 638 regulations

All Indian Pueblo Council/Tribal Administrators mtg

It is the general consensus of participants in this review meeting that most of the issues of concern to the various tribes are adequately addressed in the proposed amendments.

There are however, a few items which need emphasis and they include the following:

1. Appropriations, Budgets and Allocation of appropriated funds.

   Past and current budgeting systems, especially the BIA's have been anything but effective. The tribal budgeting systems should be based on the realistic needs of the tribe and used to justify appropriations requests. The current Indian Priority system does not have this effect and needs to be changed so that it does.

   It is recommended that the budgeting process and allocation of funds to Tribal contracts be free of the government agency's requirement to maintain certain levels of FTE's. It has been the experience of some tribe's that this requirement has been a major obstacle in getting tribal contracts approved and implemented on a timely basis.

   It is recommended that the concepts of funding utilized within the Administration for Native Americans, the Block Grant System, Revenue Sharing or any other system which in fact provides a real opportunity to plan and implement their programs based on their needs and their abilities to administer them.

2. Regulations - It must be pointed out that tribal governments today are dealing with a lot of different agencies of the Federal government. Our recommendation is that such agencies adopt uniform, simplified, straightforward uncumbersome regulations to be applied to Tribal contracting.

3. Liability Insurance.. The provision in the amendments which requires tribes to obtain adequate liability ininsurance is not an acceptable one. The provisions relating to The Public Health citing that a tribal organization or Indian Contractor carrying out a contract, grant agreement, or cooperative agreement under this section......is deemed to be part of the Public Health Service of the Department of Health and Human Services while carrying out such contract, or agreement and its employees (including those acting on behalf of the organization or contractor as provided in...) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement. This provision is more acceptable and should be applied to all contracts and agencies.

ATNI
Affiliated Tribes of Northwest Indians

Testimony of Joseph B. DeLaCruz, President
Affiliated Tribes of Northwest Indians
Before the
Senate Select Committee on Indian Affairs
Hearing on the
"Indian Self-Determination Act Amendments of 1987"

September 21, 1987
Tampa, Florida

I appreciate the opportunity to testify before the Senate Select Committee on Indian Affairs regarding the "Indian Self-Determination Act Amendments of 1987" representing the view of the Affiliated Tribes of Northwest Indians. As an overall legislative package, we are supportive of its provisions. The amendments greatly improve the P.L. 93-638 contracting arrangements for Tribal governments and offer greater stability for Tribal government operations. The Senate Select Committee on Indian Affairs staff have exhibited knowledge of the P.L. 93-638 process and a willingness to consider Tribal suggestions in formulating these amendments.

I was privileged to be involved in the policy discussions and legislative deliberations in the early 1970's as the Indian Self-Determination Act evolved into reality. In principle, the Act was designed to assist Tribal governments develop and manage their own affairs. Tribal government development through the P.L. 93-638 process over more than a decade have experienced their natural share of failures and successes. The BIA and IHS, primarily service agencies, have experienced their own difficulties transforming to contractual functions. These tensions between the agencies and the Tribes in implementing the P.L. 93-638 will hopefully be reduced by these amendments.

SELF-DETERMINATION POLICY NOT REALITY

We believe that by adopting this Indian Self-Determination policy, Congress intended to strengthen our government-to-government relationship with the United States, by involving Tribes in all of the decision-making and policy development with respect to federally funded programs. We believe Congress also intended that Tribes would develop their capabilities to take over operation of these programs.

This policy was developed largely through the initiative of the highest office in this land. President Nixon announced "A New Era for the American Indians" in a statement released on July 8, 1970.

This policy declared:

> "The time has come to break decisively with the past and create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."

As this policy progressed, President Nixon observed in his January 30, 1971 State of the Union message to Congress:

> "We shall continue to encourage Indians and their tribal governments to play an increasing role in determining their own future."

President Reagan's Indian policy statement, released in January of 1983, recognizes the gains which have been made where it states:

> "Our policy is to reaffirm dealing with Indian Tribes on a government-to-government basis and to pursue a policy of self-government for Indian Tribes without threatening termination."

It further states:

> "Tribal Governments, like state and local governments, are more aware of the needs and desires of their citizens than is the Federal Government...."

These important statements of policy, however, have not matched reality in Indian Country. I would like to emphasize two major concerns for Committee consideration in developing meaningful amendments to P.L. 93-638. These issues are the stability of Tribal government operations and Tribal leadership involvement in the policy decision-making process. Corrective legislative amendments to the Indian Self-Determination Act to address these basic concerns will be a major improvement to this most important legislation.

STABILITY OF TRIBAL GOVERNMENTS

Currently Tribal governments cannot operate and plan with any stable expectation of revenue from year to year as we're subject to the political policy considerations in the administration's proposed annual budget to Congress. The administration's budget proposals eliminating essential programs or shifting appropriations to internally designed priorities are well documented and have generally been rejected by Congress in recent years. Tribal governments, unfortunately, must base their next fiscal year budgets and program plans on these administration budget concoctions.

Thousands of agency/Tribal staff hours and probably several million dollars in salaries each year are wasted preparing fiscal budgets and programs to these often meaningless budget figures. Although these administration budgets are driven by political wish, the agencies and Tribes must use these unrealistic proposals as their planning documents. Each year the stability of Tribal government operations are threatened and left dangling between the old axiom of what the President proposes and Congress disposes. Hopefully, the multi-year contracting features and base funding protections included in these amendments can be strengthened to ensure some measure of protected expectation. A simple procedure we suggest is for Tribal government contracts for each fiscal year be based on the current year contracted scope and funding level with the standard provision of "subject to the availability of funds."

How can we develop the economies of our communities when we are forced to expend our limited resources to subsidize Federal programs? Even though both the Senate Select Committee on Indian Affairs and the House Interior Committee have indicated an intent that the Tribes recover full costs of operating Federal programs, the BIA is still looking for a way to avoid paying them. The budget requests by both agencies for FY 1988 were deficient by over ten million dollars each. We estimate that the BIA request would fund less than 70% of indirect costs. Sometimes it appears that the BIA is attempting to undermine our ability to gain some measure of self sufficiency.

LEGISLATIVE RECOMMENDATIONS TO STABILIZE TRIBAL GOVERNMENTS

There are two most important changes we wish to recommend to stabilize Tribal government operations. First, there is a need to legislate a budget planning and allocation system which requires stability and Tribal participation. Currently the budget planning and allocation systems of both agencies are subject only to administrative policy. Either agency can change what they want, when they want, or at least create havoc by proposing changes through the annual budget submission.

What we are requesting is a more formal structure for Tribal involvement in planning and a more formally recognized system, not subject to the whims of individual Federal officials. The Indian Priority System utilized by the BIA accounted for $295 million in FY 1987 or almost one-third the BIA budget. This system provides the kind of framework we would like to see, if it were honored. But it hasn't been. Each year different programs are targeted for removal. Housing improvement, self determination grants, contract support, financial trust services and Credit and Financing are examples. Road Maintenance is being removed in FY 1989, unless the Congress intervenes.

For this reason we would recommend that the following language be included in place of section 106 (f) of the bill.

> "106 (f) The secretary shall implement a budget allocation system which provides maximum stability of recurring base program funding at the service level, and reflects maximum participation of Tribal governing bodies in the planning and priority setting for such programs, whether contracted or not contracted by the Tribes. Provided that neither secretary shall change or propose allocation or distribution of budgeted funds for such programs, or any other changes which would create significant deviations in recurring base program funding allocations, without first obtaining approval with the appropriate Congressional Committees. The secretary shall implement this provision through Regulations.

The second recommended change to accomplish is full recovery of costs and funding allocations. The House bill language amending the P.L. 93-638, defining contract support costs and requiring full allocation of contract support costs, provides a more complete description of what contract funding allocations should be based upon. We would like to see that language given full consideration.

(reference: Language in H.R. 1223 as of July 29, 1987:)

> "Section 3 (g) "contract support" means the reasonable cost for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contracted and prudent management, but which --
> (1) normally are not carried on by the respective Secretary in his direct operation of the program; or
> (2) are provided by the Secretary in support of the contracted program from resources other than those under contract:
>
> Section 8 (h) (1) The amount of funds provided under the terms of contracts entered into pursuant to this Act shall be no less than the appropriated secretary would have otherwise provided for his operation of the programs or portion thereof for the period covered by the contract.
> (2) To the amount available under subsection
> (h) (1) of this section shall be added the negotiated contract support costs"

By including this proposed language, Tribes would receive a fair allocation of funds, irrespective of their indirect cost rates.

Tribes all treat costs a little differently. The allocations should include all real and necessary costs, whether or not they are included in the Tribes indirect cost rate. For example, many expenditures, such as unemployment taxes are not included in the tribal level when the BIA operates a program, nor are they included in Tribes indirect cost rates. A Tribe, in contracting, would automatically have less to spend on the program due to this factor. Further, there are the insurance costs for which Tribes don't obtain additional allocations presently. We believe the house definition of contract support provides a mechanism for recognizing these costs.

CONSULTATION WITH TRIBAL LEADERSHIP IS CRITICAL TO SELF-DETERMINATION

I am sure the Senate Select Committee on Indian Affairs is well aware of recent administrative proposals generated by the BIA and IHS under the guise of "improvements" which would have been devastating to Indian Country. There was obviously no attempt to consult with Tribal leadership on these policy proposals until forced to do so by Congress. This policy formulation and implementation process from behind closed doors is both unacceptable and unreasonable. If these policies had been discussed openly with Tribal leadership in a spirit of dialogue, I would expect that some policies would have been endorsed given modification. Unfortunately, the BIA particularly has adopted a posture of confrontation and intimidation. The IHS has met extensively with Tribal leaders this past year, but are being forced to implement policies created by faceless and unaccountable bureaucrats in the Health Resource Services Administration. Possibly the IHS relationship on consultation is only a more sophisticated approach to Tribes for telling our future with the BIA.

American Indian leaders observe with amazement and cynicism the continued attempts by administration officials to superimpose their administrative concepts without consultation. Is it so unreasonable for us to be involved in the decision-making processes directly impacting our lives in the spirit of self-determination? Without our involvement, plans become plots, strategies become manipulations, and new priorities become attacks. The list of negative assessments of administrative initiatives in the House Interior FY88 appropriations report is clear testament to their non-ability to communicate with Tribes.

Just last week the BIA held a meeting in Reno, Nevada to discuss how the Self Determination Grants, Core Management Grants or Small Tribe Assistance Grants, and Contract Support allocations will be made. Tribal leaders were not asked to participate. Once again we're being told, by our omission, that our contribution to discussions on the implementation of programs affecting our communities and lives are irrelevant by the Bureaucrats. Our voices and views, however, will be heard.

The bureaucracies give lip-service to consultation. Top administrative officials fly in to hastily arranged meetings, tell us of their plans, and dash off to an awaiting plane and call this consultation. Mid-level administrators call Tribal officials to local meetings, vaguely explain program initiatives, and are unable to answer the most basic questions and this is called consultation. We will break down this communication barrier if we have to legislate administrator behavior as our voices and views will be heard.

The past few years will be remembered as years when many changes to Federal programs for Indians were attempted, some successfully, without meaningful consultation and without giving Tribal governing bodies on opportunity to examine the impact on their communities. It has been an era of the bureaucracy attempting to regain control over programs being operated by Tribes, through removal of the funding from the Indian Priority System. Attempted avoidance by the Federal government of its obligations seems to have been the theme of budget submissions, by both agencies. Hopefully, these P.L. 93-638 amendments will further promote the policy of self-determination.

I express these concerns from frustrations in making Indian Self-Determination a workable reality. Certainly there will be problems in the future; that is to be expected. But stable Tribal government operations and meaningful Tribal leadership involvement on policy development are essential ingredients to Indian Self-Determination.

638 AMENDMENTS ARE POSITIVE DIRECTION

We support the amendments to the language in the act which recognize that the federal government's relationship to each Indian Tribe is unique, and which supports strong Tribal governments.

For example we support amendment sections that streamline the contracts process by developing the non procurement contract, by creating mature contracts, by consolidation of mature contracts with reduced reporting requirements, and by protecting the funding base of contracts from Secretarial reduction.

We are pleased that the issues of over and under recovery are addressed positively. The nemesis is of theoretical over and under recoveries has plagued Tribal administration long enough. Tribes have testified to Congress as far back as 1982 that the problems of over and under recovery are causing Tribes to go bankrupt. With your prompt action on this bill, Tribes can survive the upcoming fiscal year.

We certainly support the many other provisions of the bill. We're also very appreciative of the opportunity we've had to work with the staff and provide input while this bill was being drafted. This has occurred in the best sense of Indian Self Determination. Unlike some of our recent dealing with the BIA and IHS, this Committee and it's staff have recognized that there must be Tribal input into decisions essential to Tribes.

Hopefully, with these improvements to the law in place, we can improve our stability and make even more progress towards gaining a greater measure of self sufficiency.

Testimony For Committee
On Indian Affairs
P.L. 93-638 Amendments

Presented by United Sioux Tribes
Of South Dakota
Development Cooperation

Date September 21, 1987

Clarence W. Skye

UNITED SIOUX TRIBES OF SOUTH DAKOTA
TESTIMONY
SENATE COMMITTEE OF INDIAN AFFAIRS

P.L. 93-638
Indian Self-Determination Act Amendments

Mr. Chairman and Members of the Senate Committee on Indian Affairs, I am very delighted to testify before the Committee today regarding the proposed amendments to the Indian Self-Determination Ac. The Indian tribes in the Aberdeen Area have really had problems with P.L. 93-638 contracting mechanics within the law. Of course the Bureau of Indian Affairs has not made it any easier for the tribal governments to function in contracting.

I think the tribes appreciate the law of P.L. 93-638 and its intent to strengthen tribal governments through contracting, but if I may suggest that the Bureau of Indiann writes the regulations that those same regulations go through a counseltation process with the tribes who must live by them. In other words the Bureau of Indian Affairs under minds the sole intent of Congress through the law to subvert the Indian tribal government progress where the act was suppose to help.

The Indian tribes would progress more quickly in contracting with the Bureau of Indian Affairs and Indian Health Service if they did not have to live under the fear of reduced indirect costs or a shortage of funds in the contract budget. There is never enough funds requested by the Bureau of Indian Affairs in their budget for the Indian tribal governments to provide quality services to their tribal membership. Indian people have suffered long enough over the years with broken promises and very little production by our trustee. We must have the involvement from Senators like yourselves who try to understand our problems as complicated as they may seem, we are still people with needs like any one else.

Mr. Chairman, the United Sioux Tribes of South Dakota supports the Indian Self-Determination Act Amendments with some additions to the bill. In Section (7) in sub-section (c) on page 13, under donate, should include the words and assets inserted between property and found. Under sub-paragraph (10) you want to include the words after the appropriate Secretary shall disclose the words "within 30 days" because sometimes the federal agenices dealing with tribal governments find ways of blaming some federal employee for not getting the work accomplished.
Somewhere in the bill Senator, it should include allowable funds to tribal governments from the Bureau of Indian Affairs and Indian Health Service monies to pay for indirect costs proposals.

Also, in the bill the words "carry forward waived" for tribes who lack the resources to repay the government. The Inspector General's office uses that term in their review to reduce the indirect cost the tribes are suppose to receive.

Thank you.

TESTIMONY BEFORE

THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS ON THE BILL TO AMEND P.L. 93-638

THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

THE ALASKA NATIVE HEALTH BOARD

THE ASSOCIATION OF REGIONAL HEALTH DIRECTORS

THE ALEUTIAN/PRIBILOF ISLANDS ASSOCIATION

THE BRISTOL BAY AREA HEALTH CORPORATION

THE COPPER RIVER NATIVE ASSOCIATION

THE KODIAK AREA NATIVE ASSOCIATION

THE MANIILAQ ASSOCIATION, THE NORTH PACIFIC RIM

THE NORTON SOUND HEALTH CORPORATION

THE NORTH SLOPE BOROUGH, THE SOUTH CENTRAL FOUNDATION

THE SOUTHEAST ALASKA REGIONAL HEALTH CORPORATION

THE TANANA CHIEFS CONFERENCE AND

THE YUKON-KUSKOKWIM HEALTH CORPORATION

Presented by:
Margaret Roberts, Alaska Native Health Board, Kodiak Area Native Association.

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SEPTEMBER 21, 1987

TESTIMONY BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

My name is Margaret Roberts and I am the Chairman of the Kodiak Area Native Association, a tribal organization serving the needs of the Alaska Native people from the Kodiak Island group. I am also a member of the Board of the Alaska Native Health Board, a statewide organization established to champion the health care needs of Alaska's Native people. I am testifying today on behalf of the Alaska Native Health Board, as well as on behalf of the Alaska Association of Regional Health Directors and their thirteen member tribal organizations: the Aleutian/Pribilof Islands Association, the Bristol Bay Area Health Corporation, the Copper River Native Association, the EEDA Consortium of Tribes, the Kodiak Area Native Association, the Maniilaq Association, The North Pacific Rim, the North Slope Borough, the Norton Sound Health Corporation, the Southcentral Foundation, the Southeast Alaska Regional Health Corporation, the Tanana Chiefs Conference and the Yukon-Kuskokwim Health Corporation.

In Alaska we have a very special interest in the amendments to the Indian Self-Determination Act now pending before this Committee. Ever since its passage in 1975, Alaska's 200 tribes and their representative tribal organizations have been leaders in the government-to-government contracting authorized by the Act. For instance, in FY 1987 tribes and tribal organizations in

Alaska have contracts with the Indian Health Service totali. some $46.2 million (including IPA budgets), well over one-third the entire Alaska Area IHS budget. On the BIA side, the Juneau Area Office indicates that approximately $16.5 million in Self-Determination contracts are currently in effect.

The Alaska Native Health Board, the Association of Regional Health Directors and the regional health corporations unanimously support the proposed 1987 Indian Self-Determination Act Amendments. The amendments will substantially improve the 638 contracting process, remove many of the impediments which currently exist in the 638 contracting process, relieve 638 contractors of inappropriate contract and special procurement requirements, and compel the Department of the Interior and the Department of Health and Human Services to follow the Act's mandate despite these agencies' oft-stated view that certain types of programs are not contractible.

With this in mind, I turn to a few specific provisions in the Act which are of particular interest to us in Alaska.

1. Federal Tort Claims Act coverage.

First, we very strongly support Section 201(a) of the bill establishing a new Section 102(c)(2)(A). This new section would bring tribes, tribal contractors and their health care provider employees under the umbrella protection of the Federal Tort

Claims Act. In 1975 Congress intended that, with regard to funding, a 638 contractor would stand in the shoes of the United States. That is, the contractor would carry out specified health programs otherwise carried out by the United States. Likewise, under Section 106(h) the 638 contractor would receive funds "[no] less than the appropriate Secretary would have otherwise provided for his direct operation of the programs *** ". At the same time, Congress authorized the Secretary of Health and Human Services to require "adequate liability insurance" (Section 103(c)).

When we in Alaska have negotiated contracts with the Indian Health Service we have never been satisfied that the Service has fully funded those contracts in accordance with Section 106(h). But even if the Service did so, there is no component in the Service budget for liability insurance. For this reason, IHS has never added funds in 638 contracts to cover the costs of malpractice insurance premiums. Instead, such insurance has been paid for out of program funds at the direct expense of those programs. We do not believe that Congress intended for the Indian people to shoulder the burden of liability coverage which had always been carried by the Federal Government under the Federal Tort Claims Act.

To us this system makes little sense in logic, and has resulted in millions of dollars being spent on insurance premiums rather than on Native American health care. The problem has also undermined the contracting process itself. The Maniilaq Association is experiencing severe difficulties in negotiating their new contract to operate the Kotzebue Service Unit in part precisely because of this insurance question. The Yukon-Kuskokwim Health Corporation may well be unable to contract to operate the in-patient services in the Yukon-Kuskokwim Delta Service Unit if it is required to purchase liability insurance--not simply because of the cost of the insurance, but because such insurance may simply not be available. Other corporations like the Southeast Alaska Regional Health Corporation have met this crisis by setting up their own self-insurance fund. But again, this has only been possible by diverting hundreds of thousands of dollars which by all rights should be spent to provide health care services to our people.

According to a recent survey undertaken by the IHS Alaska Area office, from 1984 through 1987 malpractice premiums for Alaska's 638 contractors climbed from $293,406 to $1,314,465--some 448%! In the next fiscal year these premiums are estimated to rise at a minimum an additional 30%, to $1,709,252. To make matters even worse, during the same period most coverages have been reduced to $500,000 from $1,000,000. Because of the insurance crisis, coverage is often entirely unavailable. Finally, in other areas insurance companies simply will not insure the bulk of the 638 contractor's employees, including

Community Health Aides who form the backbone of rural health care in Alaska.

As this history demonstrates, in the last two years, nearly $2.5 million in funds which Congress directed be spent to provide health care to Alaska's Native people have instead been spent on insurance premiums. During the same period, only three malpractice claims were asserted out of the tens of thousands of patient contacts. The first two were unsuccessful, and the third was just recently filed. In short, 638 contracting produces a substantial diversion of federal health care dollars to private insurance companies with no identifiable benefit to the Federal Government. To us, the answer is clear: the law must be changed to guarantee Federal Tort Claims Act coverage for 638 contractors and their health care employees. For this reason, we wholeheartedly support the Bill's proposal to add a new Section 102(c)(2) to the Act.

We do suggest that the Committee clarify one critical point when preparing its Report on this very important provision. We ask that the Committee Report make it abundantly clear that this amendment is intended to cover all malpractice suits, including suits arising out of alleged acts or omissions occurring prior to the effective date of the Amendment. Presently 638 contractors in the health field are required to carry what is known as "tail liability" insurance at a cost which can often exceed the cost of coverage for claims accruing during the policy period. "Tail liability" covers claims made during the policy period but which originally accrued sometime before the current policy was purchased. The combined effect of (1) the "discovery" rule in many states (which provides that claims do not accrue until the injury is discovered), (2) the typical two-year statute of limitations, and (3) the tolling of the limitations period during the age of minority (which can produce a delay of up to eighteen years before the statute of limitations begins to run) means a 638 contractor faces substantial exposure for claims accruing prior to the effective date of the new proposed amendment. A limitation of new Section 102(c)(2) strictly to claims arising after the date the amendments are passed (as opposed to all claims made regardless of when they arose) would therefore be of limited utility in redirecting funds spent on insurance premiums back to health services.

For these reasons we urge the Committee to favorably report this Amendment.

2. Title I.

We strongly support Section 102 (modifying the Declaration of Policy), Section 103 (among other things, adding new definitions for contract costs, direct program costs, indirect costs, mature contracts and self-determination contracts), and Section 104 (reducing the records retention requirements presently imposed on 638 contractors).

3. Title II.

Section 201. We strongly support Section 201(a) of the bill redefining the duty of the Secretary of Health and Human Services to enter into contracts at the request of a tribe or tribal organization. The new language responds to the problem often encountered by tribal contractors regarding the contractibility of certain components of the Indian Health Service. This section will also provide the necessary authority to allow tribes and tribal organizations in Alaska to contract with other agencies of the United States to administer programs benefiting Alaska Native people. This will provide 638 contractors with new opportunities to coordinate Native American programs in a way that the Federal Government itself is presently unable to do.

Because of problems we have encountered in the past, we do ask that the Committee Report make clear that neither HHS nor BIA may deny a contract proposal on the ground the activity is a "trust responsibility" or an "area function". The "trust responsibility" defense in theory would be a basis for refusing any contract since all of the Native American programs arise out of the federal government's special trust responsibility. In practice, it has operated as a means of arbitrarily refusing contracts. The "area function" defense allows HHS and BIA to unlawfully refuse to contract a wide array of functions -- for instance, property acquisition, personnel management, data and planning, community health services, planning and construction of waste disposal systems -- simply because by administrative accident or convenience those functions have been staffed at the area level. We firmly believe most of these functions can be contracted to the regional tribal contractors. In the rare instance where they cannot be so divided, an entity like the Alaska Native Health Board should be able to contract the function for the entire area provided the Board has resolutions of support from Alaska's regional health contractors (as representative, by resolution, of their own tribal villages). We ask that the Committee Report reflect this strong policy in favor of such contracting.

We also strongly support those portions of Section 201 and Section 206 which provide stricter guidance on the declination process and greater procedural protections in that process. In the past, the declination requirements have often not been followed. Although many contracts have been denied, rarely has the declination process been implemented. Most typically, the declination procedures have simply been evaded by IHS with the argument that a particular issue is a "threshold" issue and therefore does not trigger declination rights. We strongly urge the Committee in its Report to clarify that, by its amendments, it intends to eliminate the IHS practice of denying contracts on the basis of perceived "threshold" issues without according the tribal contractor all of the declination rights of appeal.

Section 202. With regard to Section 202 of the bill, we welcome the addition of a new section mandating that the Secretary provide technical assistance on a non-reimbursable basis to 638 contractors. We suggest that the amendment be clarified so that it is directed at both the Secretary of the Interior and the Secretary of Health and Human Services.

Section 202 would not make any amendments to Section 104(a) of the Act. However, we do know that in Alaska tribal villages have been especially damaged by Assistant Secretary of the Interior Ross Swimmer's proposal to eliminate the Section 104(a) grant program in FY 1988. Although we understand that Secretary Swimmer's initiative is likely to be rejected in the appropriations process, in the event this does not occur we ask the Committee to add language to Section 104(a) which would preserve this important grant program for our villages.

A related development in Alaska has been the Juneau BIA Area Office's recent decision to discontinue Section 104(a) grants to tribal villages on the ground that these villages were not listed in the official 1986 publication of villages entitled to receive services from the Bureau of Indian Affairs. The Bureau recognizes that all of these villages have long been recognized, participated in the settlement of aboriginal claims effected by the Alaska Native Claims Settlement Act, and have received BIA grants ever since the inception of the Section 104(a) grant program. Nevertheless, as we understand it the singular efforts earlier this year of a now ex-employee of the BIA's Juneau Area Office has resulted in the discontinuation of 104(a) grant funding to these tribes in FY 1987 and beyond. If this matter is not resolved in the appropriations process we ask that the Select Committee address this issue as well by directing the Bureau to restore Section 104(a) grants to all villages which have historically received them.

Section 204. We in Alaska also strongly support Section 204's administrative provisions, especially in their exemption of self-determination contracts from the Federal Procurement Policy Act. Even with such an exemption, however, tribal health contractors are still required to consult a number of different sources in determining whether or not they are in compliance with the law. In addition to the special indirect cost regulations, tribal contractors must be aware of the relevant provisions in Titles 41, 42 and 25 of the Code of Federal Regulations. From the Indian Health Service we are also faced with countless "Indian Self-Determination Memoranda", "Indian Self-Determination Advisories", and other non-published interpretations of the Act and regulations. Contract negotiations and compliance reviews often become a game in which each side seeks out progressively more obscure agency regulations or unpublished interpretations of law. Such a game does little justice to the integrity of the self-determination contracting process and only diverts resources from the ultimate task of providing quality services to Native Americans through an open government-to-government relationship. We therefore ask that the Committee consider additional language requiring that all Departmental interpretations of the Indian Self-Determination Act and the contracting process be published in the Federal Register. Regulations should also all be compiled in one Title of the Code of Federal Regulations. We submit that tribal and IHS officials alike would be better served by an open, published and freely accessible set of regulatory groundrules.

Section 205. Other than the Federal Tort Claims Act provision, arguably the most important provision in the bill is Section 205, directed at problems associated with contract funding and indirect costs. The problems of the current indirect cost system have been well documented elsewhere and need not be repeated here. A recently published joint report of the Northwest Portland Area Indian Health Board and the Affiliated Tribes of Northwest Indians, entitled "Determining the True Cost of Contracting Federal Programs for Indian Tribes", very clearly marshals this data together. We strongly urge that this excellent report be made an official part of this hearing record.

The value of Section 205 is that it guarantees -- for the first time -- that 638 contractors will receive all contract costs including indirect costs. Their funds will not be tapped in order to fund other self-determination contracts. Their funds will not be tapped to fund the Secretary's monitoring or administrative functions. And their funds will not be tapped to pay for a wide array of other federal expenses or departmental initiatives. Each of these provisions is necessary in response to actual actions or attempted actions in past years. They therefore provide a new measure of added security to the contracting process.

The departmental reporting requirements of subsection (b) will also be invaluable in future years. The information which would now be required has frequently been requested by congressional committees and by tribes and tribal contractors, often without success. By regularizing the reporting requirement, the Departments will be encouraged to put in place mechanisms which more accurately report the indirect cost needs of tribal contractors.

We also welcome the new protections in subsections (c) and (d). In the past, tribal contractors in Alaska have been penalized because of the failure of other federal agencies to recognize the indirect cost rate negotiated between the 638 contractor and the cognizant federal agency. These subsections will remedy this unjustified hardship which, as illustrated well in the Northwest Portland Area Report often leads to a never-ending cycle of underfunding.

While we welcome time limitations to limit the Secretary's authority to disallow costs, we believe that the one-year period set forth in subsection (e) is too long a period to wait for such notice. Rather, we suggest that a more appropriate time frame would be 180 days.

Finally, we welcome the special designation of certain contracts as "mature". We note that as presently drafted the only consequence of this designation appears to be that a "mature" contractor is entitled to a 5-year contract rather than the current maximum 3-year contract. While we agree that this is an important change, we also believe that the Act should be amended to reduce the frequency and detail of the monitoring requirements imposed by IHS. In Alaska, most of the tribal contractors have been carrying out their contracts successfully and without substantial audit or program exceptions for many years. IHS officials and the 638 contractor officials routinely go through a stylized dance year after year in order to comply with all of the regulations and manual provisions regarding contract compliance. The suggested amendment would relieve both the tribal contractor and the IHS officials from this unnecessary burden. Of course, the amendment should be drafted in such a way that IHS officials retain the authority to monitor contract compliance and performance where necessary to carry out the Act's purposes.

4. Additional provisions.

In addition to commenting on the existing provisions of the bill, we would like to suggest several new provisions.

Carryover funds. Under current law, 638 contract funds that are not expended in the year in which they were originally appropriated can be "carried over" into the next fiscal year. Under current law, carryover funds should be made available to contractors on a virtually automatic basis, and agency regulations reflect this. See 25 CFR 271.55(b); 42 CFR 36.236. But in reality the system of providing carryover funds has several deficiencies.

Some tribal contractors are required to provide a detailed line item justification for each request for carryover funds, even where those funds are to be used for their originally contracted purpose. Furthermore, the agencies generally require that the audit for the original fiscal year must be complete before any carryover funds are provided. These factors in combination create delays of well over six months in gaining access to carryover funds. This prevents tribal contractors from planning for use of these funds on a long term basis, and, as the end of the fiscal year approaches, contractors are forced to use these funds for short term projects that are often not those most needed by the people.

We propose an amendment to P.L. 93-638 to require that if carryover funds are to be expended in the succeeding fiscal year for the purposes for which they were originally contracted, no additional justification or documentation of these purposes need be provided by the contractor as a condition of receiving and expending the funds. The amendment should also provide that at least 80 percent of carryover funds should be available on the first day of the succeeding fiscal year, regardless of whether the audit is complete for the preceding year. The remaining 20 percent would provide a more than adequate margin for error in case the audit shows that the amount of carryover is somewhat different than originally estimated.

Intergovernmental Personnel Act issues. One of the major problems which impedes the 638 contracting process in Alaska has been the peculiar rules which govern the assignment of IHS federal employees to the 638 contractor under the Intergovernmental Personnel Act. When a tribe assumes control of a program under a 638 contract it has the option of retaining current federal employees in the program under the IPA. Such federal employees are considered either to be "on detail" or "on leave without pay" from the Agency. The use of the IPA process by tribal contractors is both beneficial and critical, for it assures continuity when shifting from IHS administration to tribal contractor administration. It also preserves important federal benefits. However, as interpreted by IHS there are several peculiar consequences of IPA assignments, with the net effect that the 638 contracting process is impeded.

First, the IPA agreement itself is considered by IHS to be a personal agreement. That is, if the particular employee covered by the IPA agreement resigns or is terminated, the 638 contractor cannot obtain a replacement federal employee, even if one is willing and available. Instead the 638 contractor must seek to hire a replacement on the open market. This severely restricts the pool of available qualified applicants.

A second problem is that IHS views certain IPA agreements as possible only if the employee goes on "leave without pay" status. But if the employee does so, he or she does not receive any credit toward federal retirement under the period of the leave (a maximum of 4 years under the IPA) This too, undermines the IPA process.

Third, the IPA agreement is construed by IHS as specific to the job itself and the particular GS rating at which the IPA employee was detailed. As a consequence, a 638 contractor is unable to promote an employee covered by an IPA agreement.

Likewise, it is unable to move an employee covered by an IPA agreement to another job. The lack of career development and job advancement further undermines the IPA process. Further, the restrictions on shifting IPA employees to new positions severely impedes the contractor's flexibility to administer the program effectively. It is not surprising that where the IPA process has been extensively used in Alaska, over time the number of IPA positions dwindles.

Lastly, as a rule IHS does not include the IPA budget in a 638 contractor's contract document. For instance, let us assume the total 638-operated budget is $10 million, and that $5 million of that amount covers the salaries of IPA employees. In this situation, IHS will only include $5 million in the 638 contract. In theory -- and in law -- when an IPA employee later leaves his or her position, the funds committed to the IPA agreement should be made available to the tribal contractor to hire a replacement. In practice, however, IHS has often taken the view that it has discretion over how to reallocate such funds because the funds are not "in the contract." Sometimes these funds are shifted by IHS to cover shortfalls in other parts of the agency's budget. As occurred last year with the Southeast Alaska Regional Health Corporation, this can produce enormous hardships. Under this scenario a tribal contractor agrees to take over a program with the understanding that the staffing of that program is fixed in the contract through the IPA agreements, only to find out several months later when vacancies have occurred that the Indian Health Service refuses to provide the committed funds to fill the vacancies.

Although the problems associated with application of the Intergovernmental Personnel Act may seem technical, they are vitally important to the success of 638 contracting. 638 contracting of major programs cannot succeed without substantial use of the IPA process. Only through the IPA process can experienced IHS staff, willing to continue with the tribal contractor, be transferred over without losing their federal benefits. Improving the IPA process is therefore a critical linchpin in guaranteeing the success of the 638 contracting process. We urge the Committee to consider adding a new section to the bill to address these concerns.

Pay Act issues. We also ask that the Committee address the need for reform in the Pay Act area. In Alaska, 638 contractors' employees are ignored for purposes of the Pay Act. That is, the Area and Central Offices simply do not count tribal employees when computing the amount IHS needs to fund a certain percentage increase under the Pay Act. (To our knowledge the same is true elsewhere.)

Up through fiscal year 1986, whenever the Alaska Area received its allocation of Pay Act funds it would comply with

Section 106(h) by sharing those funds pro rata with 638 contractors in the Alaska Area. Although this allowed the Area Office, the IHS-operated service units and the 638 contractor-operated service units and programs to make salary adjustments under the Pay Act, the funds were necessarily inadequate because the 638 employees had not been counted when IHS formulated the original Pay Act budget request to Congress.

In fiscal year 1987, the situation in Alaska has become considerably worse. Under a proposal just announced by the Alaska Area Director, the Area's recent allocation of Pay Act funds may only partially be shared with 638 contractors. Such action would be a plain and flagrant violation of the Pay Act as well as the provisions of Section 106(h) of the Indian Self-Determination Act guaranteeing that tribal contractors will be funded at no less than the same level as if the program were being directly operated by IHS.

IHS officials appear to recognize the problem and the resulting inequities, but have refused to change their practice. To meet this problem we ask that the Select Committee consider adding a new section requiring that the Secretary of the Interior and the Secretary of Health and Human Services count all full-time equivalent (FTE) employees of 638 contractors when requesting Pay Act increases, and likewise distribute Pay Act increases to such 638 contractors on the same basis. Without such an amendment, employees of 638 contractors will continue to operate at a disadvantage, in violation of Section 106(h), as compared to their federal counterparts.

Alaska Cost of Living Allowance. Finally, we ask that the Committee address the cost of living problem in Alaska. As the Committee is aware, in Alaska and Hawaii all federal employees receive a 25% cost of living adjustment (COLA) over and above the regular federal employee's salary. The COLA is not taxed. When 638 contractors in Alaska assume control of an IHS or BIA program, the amount they receive to fund a particular position is theoretically the same amount the agency was paying for that position, and thus includes the COLA. However, since employees of tribal contractors are not considered federal employees, the entire amount of the 638 contract employee's salary is subject to federal income taxation. This means a real dollar reduction in pay of $3,000 or $4,000 for a federal employee who opts to join the 638 contractor as a tribal employee. This presents yet another impediment to 638 contracting and perpetuates an inequality in the funding of 638-operated and direct-operated programs.

To meet this concern we suggest that the Committee add a new section to the Bill providing that 20% of the income of employees hired under a 638 contract in Alaska shall be exempt from any federal income taxation. Such a provision would equalize the 638 employee in Alaska with his or her counterparts at IHS and BIA.

On behalf of the Alaska Native Health Board, the Association of Regional Health Directors, and the Association's member tribal organizations, I thank the Committee for the opportunity to testify. I would be glad to answer any questions you may have.

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TRIBES

INTER TRIBAL COUNCIL
of
ARIZONA

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CAMP VERDE YAVAPAI APACHE
INDIAN COMMUNITY
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COLORADO RIVER INDIAN TRIBES
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STATEMENT

ON PROPOSED AMENDMENTS TO P.L. 93-638

TO THE

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

MONDAY, SEPTEMBER 21, 1987

TAMPA, FLORIDA

Presented

by

Anthony Drennan, Chairman, Colorado River Indian Tribes
Vice President, Inter-Tribal Council of Arizona

for

The Inter-Tribal Council of Arizona

24 West Thomas Road • Suite 201 • Phoenix, Arizona 85013 • (602) 248-0071

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT PROPOSED AMENDMENTS

Mr. Chairman, on behalf of the Inter Tribal Council of Arizona, I appreciate the opportunity to present testimony on the proposed amendments to Public Law 93-638 offered by the Senate Select Committee on Indian Affairs.

Background

The Indian Self-Determination and Education Assistance Act (P.L. 93-638, as amended) is a forceful and clear statement of policy by the Congress that calls for maximum Indian participation in the government and education of the Indian people, for the full participation of Indian governments in Indian programs and services conducted by the federal government, and the development of human resources of the Indian people.

The Senate Select Committee on Indian Affairs took the time to hold oversight hearings on P.L. 93-638 earlier this year and has made an effort to solicit tribal consultation through a series of meetings with appropriate tribal representatives. This process provided the Senate Select Committee staff the necessary information to draft appropriate amendments to the Act. The Committee's efforts to identify and clarify the issues in order to draft the necessary amendments is highly commendable.

Issues

The Inter Tribal Council of Arizona has worked with Indian governments over the past three years to identify concerns with P.L. 93-638 contracts, grants, funding and federal/tribal coordination. The Committee on Indian Affairs has responded positively to many of the concerns identified by Indian leaders, including:

- The need for the BIA and IHS to fully fund tribal indirect costs for P.L. 93-638 contracts.
- The need for year-to-year stability of funding levels in order to improve planning and management of programs.
- Clarifying that federal procurement laws and acquisition regulations should not apply to Indian Self-Determination contracts.
- Reducing the paperwork and reporting requirements, particularly for "mature" contracts.
- Allowing for consolidation of mature contracts, and multiyear contracts.
- Alleviating problems associated with overrecovery and underrecovery of indirect costs from federal agencies other than the BIA and IHS.
- Improving avenues for contract appeals and conflict resolution.

Recommendation

Indian Self-Determination does not only involve contracting. Indian Self-Determination also includes a cooperative working relationship between federal agencies and Indian governments. The Phoenix Area for the BIA and IHS covers three states, ten BIA Agencies, ten IHS service units, and 42 tribal governments. The BIA has some 280 contracts with tribes in Arizona, Nevada and Utah. The current 60-day timeframe for approving contracts and resolving application differences creates a crisis-oriented adversarial relationship that has resulted in delays for contract approvals. The Inter Tribal Council of Arizona recommends that the Senate Select Committee include language in the amendments to P.L. 93-638 that would:

- provide for a one-year time period for tribes and federal agencies to plan for, negotiate and enter into new contracts. This longer time period is especially important to enable the BIA and IHS to relocate federal personnel, and to plan for budget requests for indirect costs.
- require BIA and IHS Area Directors to annually report to tribes on the programs operated by their respective Area Offices, including workload statements, FTEs, planned budgets and actual expenditures.

ITCA, Inc.
9/21/87

RESOLUTION NO. 266-87-CR

WHEREAS, the Cheyenne River Sioux Tribe of South Dakota is an unincorporated tribe of Indians, having accepted the provisions of the Act of June 18, 1934 (48 Stat. 984), and

WHEREAS, the Tribe, in order to establish its tribal organization; to conserve its tribal property; to develop its common resources; and to promote the general welfare of its people, has ordained and established a Constitution and By-Laws, and

WHEREAS, the Tribe is a member of the National Congress of American Indians (NCAI), and as a member can introduce resolutions for consideration and adoption by the general membership of NCAI, and

WHEREAS, the foregoing is a resolution that the Tribe wishes to have introduced and adopted by the general membership of the National Congress of American Indians at their 44 th Annual Convention, and

WHEREAS, the Congress approved and the President signed into law, Public Law 93-638, Indian Self-Determination and Education Act, and

WHEREAS, the intent of this Act was to enable Indian Tribes to operate the various programs of the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) by contracting with the Federal Government to provide the general services authorized by these programs, and

WHEREAS, Tribes did begin entering into contracts with the Federal Government for the various programs of the BIA and IHS with the assumption that the staffing and funding of these programs would always be adequate to fulfill their contract obliations and that the level of services would continue such as when the BIA and IHS were to administer the Programs, and

WHEREAS, Tribes now find themselves increasingly unable to fulfill the obligations of their contracts due to the lack of adequate staff and funding, and

WHEREAS, Tribes are now forced to subsidize these contracted Programs from their already depleted Tribal Operating Budgets and Tribes can no longer subsidize these contracted 638 Programs, and

WHEREAS, Tribes were also assured that they would receive contract support dollars to administer these contracted Programs and these support dollars are not being realized by the Tribes, again the Tribes are being forced to absorb these contract support costs for these support dollars, and

WHEREAS, Tribes are also concerned about the liability of not being able to fulfill their contract obligations, now

THEREFORE BE IT RESOLVED, the Cheyenne River Sioux Tribal Council is hereby recommending that National Congress of American Indians advise Indian Tribes to consider retroceding their P.L. 93-638 contracts with BIA and IHS until such time that the Tribes are provided with adequate staff, funding and contract dollars to administer their Programs.

Resolution No. 266-87-CR
Page Two

CERTIFICATION

I, the undersigned, as Secretary of the Cheyenne River Sioux Tribe, certify that the Tribal Council is composed of fifteen (15) members, of whom 13, constituting a quorum, were present at a meeting, duly and regularly called, noticed, convened and held this 2nd day of September, 1987, Regular Session; and that the foregoing resolution was duly adopted at such meeting by an affirmative vote of 13 for, 0 against, 0 not voting and 2 absent.

Arlene Thompson

Arlene Thompson, Secretary
Cheyenne River Sioux Tribe

OMAHA TRIBE OF NEBRASKA

P. O. Box 368
Macy, Nebraska 68039

EXECUTIVE OFFICERS

DORAN L. MORRIS, CHAIRMAN
WYNEMA E. MORRIS, VICE CHAIRMAN
MILTON OSCAR LOVEJOY, TREASURER
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Phone (402) 837-5391

MEMBERS

EDWARD W. WEBSTER
FORREST "J.C." ALDRICH SR.
JOHN MILLER

Tribal Administration

September 17, 1987

Daniel K. Inouye, Chairman
United States Senate
Select Committee on Indian Affairs
Room 838
Hart Senate Office Building
Washington, D.C. 20510

RE: Indian Self-Determination and Education
Assistance Act. Public Law 93-638

Dear Chairman Inouye:

I am honored to be invited to this hearing today to assist in rectifying problems that have arisen out of the contracting processes contained in the Indian Self-Determination and Education Assistance Act. As Chairman of the Omaha Tribe of Nebraska and a member of the Tribal Council, I have assisted the Tribe in negotiating its long-standing contractual relationship with the Bureau of Indian Affairs and the Indian Health Service. As a result, I am uniquely qualified to set forth for you the difficulties which have arisen and the potential solutions so that the Congressional policy which will allow maximum Indian participation in the direction of educational as well as other federal services to Indian communities to be realized. It is imperative that the provisions of the Indian Self-Determination and Educational Assistance Act be amended to maximize the establishment of a meaningful Indian self-determination policy which will permit the orderly transition from federal domination of programs for services to Indian people to effective and meaningful participation by Indian people in the planning, conduct and administration of those programs and services. Further, we applaud the Congressional goal of improving the quality and quantity of educational services and opportunities which will permit the Indian children to compete and excel in life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well being.

With regard to the specific goals, it is my honor to inform you that the Omaha Tribe of Nebraska supports the amendments contained in the August 7, 1987 draft which is to amend the Indian Self-Determination and Education Assistance Act.

With regard to the proposed amendments I will set forth my comments.

TITLE I - ADMINISTRATIVE PROVISIONS

Sec. 102. Declaration of Policy. The Omaha Tribe of Nebraska fully agrees with the amendments which would strengthen the policy of the United States to support and assist Indian tribes in the development of strong and stable tribal governments, capable of administrating quality programs and development the economies of the respected communities.

Sec. 103. Definitions. The Omaha Tribe of Nebraska fully supports the amendment to Section 4 of the Indian Self-Determination and Education Assistance Act by inserting the definitions contained in Section 103. Specifically, the Tribe supports the provisions that indirect cost rates are to be arrived at through a negotiation between the Tribe, tribal organization and the cognizant federal agency and the provisions requiring implementation of the mature contract provisions in the contracting process.

Sec. 104. Reporting and Audit Requirements. The Omaha Tribe of Nebraska fully supports changes contained in Sec. 104.

TITLE II - INDIAN SELF-DETERMINATION ACT AMENDMENTS

Sec. 201. Self-Determination Contracts. The Omaha Tribe of Nebraska fully supports the amendment contained in Sec. 201 of the Self-Determination and Education Assistance Act requiring the Secretary, upon the request of the Tribe or Tribal organization, to enter into a contract to plan, conduct and administer programs, which includes construction programs or portions thereof as set forth in the Indian Reorganization Act, the Snyder Act, any functions, authorities and responsibilities of the Secretary of Health and Human Services as set forth in the Act of August 5, 1954 (68 Stat. 674), instruction programs which are administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of

Interior, and programs for the benefit of Indians without regard to the agency within which it is performed.

Further, the Omaha Tribe of Nebraska fully supports the procedures set forth which will ensure the Tribe or Tribal organization specific findings upon which the self-determination contract is declined. Finally, with regard to Sec. 201, the Omaha Tribe of Nebraska fully supports the provisions for the provisions consolidating contracts and applying the Federal Tort Claims Act to the contractor when carrying out the provisions of Sec. 104(b) of the proposed amendments.

Sec. 202. Technical Assistance and Grants to Tribal Organizations. The Omaha Tribe of Nebraska supports the amendment of Sec. 104 of the Indian Self-Determination and Education Assistance Act as set forth therein.

Sec. 203. Personnel. The Omaha Tribe of Nebraska fully supports the provisions set forth in this section.

Sec. 204. Administrative Provisions. The Omaha Tribe of Nebraska supports the provisions contained in Sec. 204 which set forth the time periods for mature and nonmature contracts. Further, the Tribe supports the provisions of Sec. 204 which permit the Tribe or Tribal organization when carrying out a contract to utilize existing facilities and equipment and other personal property owned by the government and allows the Secretary to donate to the Tribe or Tribal organization title to personal property found to be in excess of the needs of the Bureau of Indian Affairs, the Indian Health Service or the General Services Administration.

Sec. 205. Contract Funding and Indirect Costs. The Omaha Tribe of Nebraska would like to specifically point out its support for the amendments to Sec. 106 of the Indian Self-Determination and Education Assistance Act which require that the amount of funds provided under the terms of the self-determination contract not be less than the appropriate Secretary would have otherwise provided for the direct operation of the programs or portions thereof for the period covered by the contract, nor shall the funds be reduced by the Secretary in subsequent years except by a reduction in Congressional appropriation from the previous fiscal year for the program or functions to be contracted. Further, the Tribe supports the provisions that funding not be reduced by the Secretary to pay for federal functions nor be reduced by the Secretary to pay for costs of federal personnel displaced by a self-determination contract.

Finally, the Omaha Tribe of Nebraska fully supports the provisions contained in Sec. 205(b), setting forth the annual reporting requirements to the Select Committee on Indian affairs and the Committee on Appropriations of the United States Senate and to the Committees on Interior and Insular Affairs and Appropriations of the United States House of Representation. Most importantly, the Omaha Tribe of Nebraska applauds the provisions contained in Sec. 205(c) and (d) wherein Indian tribes and tribal organizations shall not be liable for the differences between the amounts actually collected and the amounts that would have been collected at 100% of the indirect cost rate, or amounts attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect cost rates, as set forth in the Office of Management and Budget Circular A-87 incurred for fiscal years prior to fiscal year 1988.

Sec. 206. Contract Appeals. The Omaha Tribe of Nebraska fully supports the addition of Sec. 206 to the Indian Self-Determination and Education Assistance Act allowing Federal District Courts original jurisdiction concurrent with the Court of Claims or a civil action or claim against the appropriate Secretary arising under contracts.

Further, the Omaha Tribe of Nebraska fully supports the provisions set forth in Sec. 206(b) preventing the United States from unilaterally modifying self-determination contracts and applying the Equal Access to Justice Act to administrative appeals by Indian tribes and tribal organizations regarding self-determination contracts.

Sec. 207. Savings Provisions. The Omaha Tribe of Nebraska fully supports this provision.

Sec. 208. Severability. The Omaha Tribe of Nebraska fully supports this provision.

I would like to thank you for this opportunity to present the foregoing material to the United States Senate.

Sincerely,

Doran L. Morris Sr.

Doran L. Morris, Chairman
Omaha Tribe of Nebraska

DLM/lln
JMP35.01